

15. C***e

R E P O R T S
OF
ADJUDGED CASES
IN THE
Court of Common Pleas

DURING THE TIME
LORD CHIEF JUSTICE WILLES
PRESIDED IN THAT COURT;
TOGETHER WITH SOME FEW CASES OF THE SAME PERIOD DETERMINED

IN THE
House of Lords, Court of Chancery, and Exchequer Chamber.

TAKEN FROM THE MANUSCRIPTS OF LORD CHIEF JUSTICE WILLES.

WITH NOTES AND REFERENCES
TO PRIOR AND SUBSEQUENT DECISIONS,
By CHARLES DURNFORD,
OF THE MIDDLE-TEMPLE, BARRISTER AT LAW.

L O N D O N :

PRINTED BY A. STRAHAN,
LAW-PRINTER TO THE KING'S MOST EXCELLENT MAJESTY,
FOR J. BUTTERWORTH, FLEET-STREET.

1799.

RECORDS
OF
ADJUDGED CASES
IN THE
Court of Common Pleas

IN THE TIME
HONORABLE CHIEF JUSTICE WHITE
PRESIDED IN THAT COURT
TOGETHER WITH SOME FEW CASES



Printed at the Court of Common Pleas, London.

WITH NOTES AND REFERENCES
TO THE ACTS AND STATUTES
BY CHARLES DURNFORD
OF THE INNER TEMPLE, ESQ.

LONDON:
PRINTED BY A. MILLAR,
STATIONER TO HIS MAJESTY, IN ST. PAULS CHURCH-YARD.
1750.

TO
THE RIGHT HONOURABLE
LLOYD LORD KENYON,
BARON OF GREDINGTON
IN THE COUNTY OF FLINT,
LORD CHIEF JUSTICE OF ENGLAND,

THIS WORK
IS,
WITH HIS LORDSHIP'S PERMISSION,
MOST GRATEFULLY
AND
RESPECTFULLY DEDICATED

BY HIS LORDSHIP'S MOST OBLIGED

AND OBEDIENT HUMBLE SERVANT

CHARLES DURNFORD.

TO

THE RIGHT HONOURABLE

ALFRED LORD KENYON

BARON OF CROFTON

IN THE COUNTY OF LINCOLN

LORD CHIEF JUSTICE OF ENGLAND

THIS WORK

IS

WITH THE LATEST REVISION

OF THE

REVISION OF THE

OF THE

OF THE

OF THE

P R E F A C E.

AS the Profession may expect some account of the authenticity of the manuscripts from which this work is taken, I think it necessary to say that they are unquestionably the hand-writing of Lord Chief Justice *Willes* himself, that they were bequeathed by him to his son the late Mr. Justice *Willes*, and by him to his son the late Mr. *Edward Willes*, from whom they came into the possession of his two surviving brothers, who have entrusted them to me for publication.

Though I am aware that indiscretion has been justly imputed to some publishers of reports from the manuscript notes of their ancestors, which they had taken for private use only, and in some instances at early periods of their professional lives, it appears to me that the present publication will neither commit the reputation of the learned Judge whose name is prefixed to it, or be liable to the objection that is sometimes deservedly raised against the publication of posthumous works.

Having attentively studied the writings and decisions of this great Judge, I think that the publication of these determinations will occasion his name as a Lawyer to be held in as high estimation in succeeding ages as it was in the time when he lived.

The present work differs from the generality of posthumous works in this respect, that the different parts of it were not only written by the Chief Justice for the purpose of making them public, but for the most part they were actually published to the profession by himself.

That the Lord Chief Justice intended them for publication in this mode is apparent from the very careful and regular manner in which, to a certain period, he copied out his own judgments in separate note books after he had written them on the paper books belonging to the particular cases: And declarations of

such an intention were made by him to the late Mr. Justice *Willes*, who wished to publish them himself, if the duties of the high station which for many years he so honorably filled would have allowed him leisure for such a work. Towards the latter part of his life indeed he was the less anxious to engage in such an undertaking, fondly hoping that it might be executed by his son, the late Mr. *Edward Willes*, who had he not been cut off at an early period of his life would have been an ornament to his profession.

The only hope I can indulge in becoming the Editor of this work is that the late season in which it is published may have enabled me to render it more valuable by references, in the notes, to the latest decisions in our courts. But this collection now appears in a more imperfect state than probably it would if either Mr. Justice *Willes* or the late Mr. *E. Willes* had published it; as many of the determinations of the Court of Common Pleas during the latter part of the time when the Chief Justice presided there are not now to be found, though it is evident from certain marks on the paper books of those cases that he had written out the judgments of the court which he publicly delivered. This loss is however in some instances supplied by the manuscripts of the late Mr. Justice *Wm. Fortescue*, and by a copy of some notes taken by the late Mr. *J. Abney*, in the hand-writing of his clerk, which I have added in the notes, the former of which were in the collection of the Lord Chief Justice *Willes*, and the latter were obligingly sent to me by Mr. Justice *Lawrence*.

In examining the collection of Lord Chief Justice *Willes*'s manuscripts, it is not (I trust) expected that I should publish the whole: I have selected such cases as appeared to me of the greatest importance. All those respecting the practice of the Court (except in very few instances) I have rejected altogether, not only because they were not of sufficient consequence to be printed in a work of this kind, but also because the decisions in many of them are already in print.

The body of this work will be found to consist of four classes of cases:

1st,

1st, Those which are taken verbatim from the Lord Chief Justice's manuscripts; and they are either the judgments of the court which he publicly delivered, containing as well his own abridgment of the record or special case as the reasons on which the opinion of the court was founded, or cases of which he wrote an account in his own note books after the cases had been determined.

2dly, The judgments of the court which he gave, without his own abridgment of the records; the records in which cases I have abstracted either from the original records or from the paper books.

3dly, Cases taken from short notes of the Lord Chief Justice's manuscripts, the records being abridged by myself.

4thly, Those where nothing more appeared on the Lord Chief Justice's paper books than simply "judgment for the plaintiff" or "for the defendant" &c, the records of which cases I have abridged, and the opinions of the court I have taken from other quarters and added in the notes.

Throughout the whole it may be observed that the language of the Lord Chief Justice is printed between inverted commas.

The notes to this work (except where they consist of references to cases already in print and to some very modern decisions) may also be arranged in four classes:

1st, Those of the Lord Chief Justice, distinguished by "MS. Lord Chief Justice *Willes*."

2dly, Manuscript cases collected from various quarters, in the possession of the Lord Chief Justice, to many of which he referred himself; and they are distinguished thus "MS. Coll. Lord Chief Justice *Willes*."

3dly, Manuscript notes of Mr. *Baron* (afterwards Mr. Justice) *Wm. Fortescue*, in his own hand writing; thus marked "MS. Mr. Justice *Wm. Fortescue*."

4thly, Notes taken by the late Mr. Justice *Abney*, afterwards copied by his clerk; thus distinguished "MS. *Abney J.*"

In presenting this work to the public, my chief apprehension is, that the notes may in some instances be deemed to be either

too long or ill arranged, though my object has been to compress them: but those only, who have undertaken a work of this kind, know the difficulty attending it. And I cannot but be conscious that whatever merit there may be in this work, it is the merit of the Lord Chief Justice; whatever demerit, it belongs to myself. Owing partly to the necessity of decyphering and transcribing myself the manuscripts of the learned Chief Justice which are in a character peculiar to himself, it has been however my occupation as well as my amusement during the vacations of several years past; and with all its imperfections I now commit it to the examination of a liberal Profession.

November 6th, 1799.

A

T A B L E

OF THE

NAMES of the PRINCIPAL CASES REPORTED,

AND ALSO OF THE

MANUSCRIPT CASES CITED OR REFERRED TO.

N. B. The latter are distinguished by an *Asterisk*.

A				
A CHERLEY <i>v.</i> Vernon	-	-	-	Page 153
Aggas (<i>Trevett v.</i>)	-	-	-	107
Alexander <i>v.</i> Mawman	-	-	-	40
Allen (<i>Rowley v.</i>)	-	-	-	318
Altham (<i>Johnson v.</i>)	-	-	-	* 479
Andrews <i>v.</i> Cawthorne	-	-	-	536
Anonymous	-	-	-	459
Archbishop of York (<i>The King v.</i>)	-	-	-	533
Armstrong (<i>Cockerill v.</i>)	-	-	-	99
Ashburnham <i>v.</i> Bradshaw	-	-	-	* 298
Aston (<i>Hervey v.</i>)	-	-	-	83
Atkinson (<i>Fann v.</i>)	-	-	-	427
Atkinson (<i>Gott v.</i>)	-	-	-	521
Atkinson <i>v.</i> Settree	-	-	-	482
Austin <i>v.</i> Whittred	-	-	-	623

B				
Baker <i>v.</i> Warren	-	-	-	* 238
Bambridge (<i>Huggins v.</i>)	-	-	-	241
b				Barker

TABLE OF THE CASES REPORTED, &c.

Barker v. Horton	-	-	-	Page 460
Barker v. Lomax	-	-	-	659
Barker (Omichund v.)	-	-	-	538
Barnett (Marpole v.)	-	-	-	* 38
Beamont (Norman v.)	-	-	-	484
Bedford Mayor &c of v. Bishop of Lincoln	-	-	-	608
Bell v. Wardell	-	-	-	202
Benion (Legg d. Scott v.)	-	-	-	45
Bennet v. Reeve	-	-	-	227
Bird (Spinks v.)	-	-	-	* 278
Bishop of Lincoln (Bedford Mayor of v.)	-	-	-	608
Bliffett v. Hart	-	-	-	508
Bolitho (Cornish v.)	-	-	-	145
Bradford v. Bryan	-	-	-	268
Bradshaw (Ashburnham v.)	-	-	-	* 298
Brice v. Smith	-	-	-	1
Bringloe (Mallom d. Marsh v.)	-	-	-	77
Broadbent v. Wilks	-	-	-	360
Bromfall (Kettle v.)	-	-	-	118
Bryan (Bradford v.)	-	-	-	268
Bullythorpe v. Turner	-	-	-	475

C

Cabell (Padfield v.)	-	-	-	411
Cadwallader (Thomas v.)	-	-	-	496
Candler v. Fuller	-	-	-	62
Cave (Musgrave v.)	-	-	-	319
Cawthorne (Andrews v.)	-	-	-	536
Cheefeman v. Hoby	-	-	-	680
Chetwode v. Crewe	-	-	-	614
Chichester v. Lethbridge	-	-	-	71
Childs v. Prowse	-	-	-	531
Clarkson v. Phyllick	-	-	-	184
Cockerill v. Armstrong	-	-	-	99
Cockfedge (Moyse v.)	-	-	-	636
Colehan v. Cooke	-	-	-	393
Coles (Jeffery v.)	-	-	-	634
				Collins

TABLE OF THE CASES REPORTED, &c.

Collins (Lindon v.)	-	-	-	Page 429
Colville (Twells v.)	-	-	-	375
Cook (Herbert v.)	-	-	-	* 36
Cooke (Colehan v.)	-	-	-	393
Cooper v. Monke	-	-	-	52
Cornish v. Bolitho	-	-	-	145
Coffens v. Coffens	-	-	-	25
Cowper (Jones d. v. Verney)	-	-	-	169
Creswell (Ward v.)	-	-	-	265
Crew (Chetwode v.)	-	-	-	614
Crisp v. Perritt	-	-	-	467
Crofs (Goodtitle d. v. Wodhull)	-	-	-	592
Crosse v. Porter	-	-	-	18
Crumble v. Jones	-	-	-	* 167

D

Dalling v. Matchett	-	-	-	215
Danby v. Gregg	-	-	-	150
Davies (The King v.)	-	-	-	* 49
Davies v. Powell	-	-	-	47
Davies d. Tully v. Hamlin	-	-	-	612
Davies v. Lees	-	-	-	344
Davies v. Mansell	-	-	-	191
Dawes v. Papworth	-	-	-	408
Dennett v. Grover	-	-	-	195
De Smeth (Storke v.)	-	-	-	67
Doe d. Milburn v. Salkeld	-	-	-	673
Doe d. Morris v. Underdown	-	-	-	293
Dormer, lessor of Smith, (Parkhurst v.)	-	-	-	327
Dovey (Richards v.)	-	-	-	622
Drake v. Wiglesworth	-	-	-	654
Drewe (Williams v.)	-	-	-	392
Dyke v. Sweeting	-	-	-	585

E

Eagle (Preston d. v. Funnell)	-	-	-	164
Eaton v. Southby	-	-	-	131

Edwards

TABLE OF THE CASES REPORTED, &c.

Edwards v. Moseley	-	-	-	-	Page 193
Edwards (Reignolds v.)	-	-	-	-	282
Ellis v. Rowles	-	-	-	-	638
Evans v. King	-	-	-	-	554

F

Fagge (Moone d. v. Heafeman)	-	-	-	-	138
Fann v. Atkinson	-	-	-	-	427
Fawcett v. Strickland	-	-	-	-	57
Fell (Master &c of Gunmakers v.)	-	-	-	-	384
Fenn v. Mariot	-	-	-	-	431
Fisher v. Kitchingman	-	-	-	-	367
Fitzgerald (Murphy v.)	-	-	-	-	* 38
——— (Pole v.)	-	-	-	-	641
Forbes (Lord Middleton v.)	-	-	-	-	* 259
Foxall (Titley v.)	-	-	-	-	688
French (Hunter v.)	-	-	-	-	517
Fulham (Roe d. v. Wickett)	-	-	-	-	303
Fuller (Candler v.)	-	-	-	-	62
—— v. Say	-	-	-	-	629
Funnell (Preston d. Eagle v.)	-	-	-	-	164

G

George v. Harding	-	-	-	-	* 24
Ginger d. White v. White	-	-	-	-	348
Goodridge (Goodright d. Goodridge v.)	-	-	-	-	369
Goodright d. Goodridge v. Goodridge	-	-	-	-	ib.
Goodtitle d. Cross v. Wodhull	-	-	-	-	592
——— d. Gurnall v. Wood	-	-	-	-	211
Gott v. Atkinson	-	-	-	-	521
Gowthwaite (Hassell d. Hodgson v.)	-	-	-	-	500
Greenbank (Winsmore v.)	-	-	-	-	577
Greenhow v. Ilfley	-	-	-	-	619
Gregg (Danby v.)	-	-	-	-	150
Grills v. Mannell	-	-	-	-	378
Grover (Dennett v.)	-	-	-	-	195
					Gunmakers'

TABLE OF THE CASES REPORTED, &c.

Gunmakers' Company v Fell - Page 384
Gurnall (Goodtitle d. v. Wood) - 211

H

Haldenby v. Tuke - 632
Hamlin (Davis d. Tully v.) - 612
Harding (George v.) - * 24
Hart (Bliffett v.) - 508
Hartopp (Simpson v.) - 512
Harvey v. Stokes - 5
Harwood (Skipp v.) - 291
Hassell d. Hodgson v. Gowthwaite - 500
Head v. Jones - * 2
Heafeman (Moone d. Fagge v.) - 138
Herbert v. Cook - * 36
Hervey v. Aston - 83
Hickman v. Walker - 29
Hoby (Cheefeman v.) - 680
Hodgskin v. Queenborough - 129
Hodgson (Hassell d. v. Gowthwaite) - 500
Horne (Wheeler v.) - 208
Horton (Barker v.) - 460
Howard v. Ratborne - 316
Horton (Turner v.) - 438
Huggins v. Bambridge - 241
Hughes (Mills v.) - 588
Hunter v. French - 517
Hutchinson v. Sturges - 261

J

Jackson v. Sharp - 525
James (Karver v.) - 255
—— (Ladbroke v.) - 199
—— (Morfe v.) - 122
Jeffery v. Coles - 634
Jenkins d. Jenkins v. Jenkins - 650

c

Jennings

TABLE OF THE CASES REPORTED, &c.

Jennings (Nottingham v.)	Page * 166
Hiley (Greenhow v.)	619
Johnson v. Altham	* 479
—— (Millechamp v.)	* 205
—— v. Warner	529
—— v. Wilson	248
Jones d. Cowper v. Verney	169
—— (Crumble v.)	* 167
—— (Head v.)	* 2
K	
Karver v. James	255
Kenward v. Knowles	463
Kettle v. Bromfall	118
King (The) v. The Archbishop of York	533
—— v. Davies	* 49
—— (Evans v.)	554
Kitchingman (Fisher v.)	367
Knowles (Kenward v.)	463
L	
Ladbroke v. James	199
Lambert (Mayor &c. of Nottingham v.)	111
—— v. Stroother	218
Lawrence (Sollers v.)	413
Layng v. Paine	571
Lees (Davis v.)	344
Legg d. Scott v. Benion	45
Lethbridge (Chichester v.)	71
Lincoln (Bishop of) v. Mayor of Bedford	608
Lindon v. Collins	429
Litchfield (Bailiffs &c of) v. Slater	431
Lloyd v. Morris	443
Lomax (Barker v.)	659
Longmore v. Rogers	288
Lumley (Tegetmeyer v.)	* 264

TABLE OF THE CASES REPORTED, &c.

M

Mackinder (Pendock v.)	Page 665
Mallom d. Marth v. Bringloe	75
Mannell (Grills v.)	378
Manfel (Davis v.)	191
Marpole v. Bafnett	*38
Marriott (Fenn v.)	430
Marriot v. Thompson	186
Marth (Mallom d.) v. Bringloe	75
Martin d. Tregonwell v. Strachan	444
Matchett (Dalling v.)	215
Mawman (Alexander v.)	41
Mayor &c of Bedford v. Bishop of Lincoln	608
—— &c of Nottingham v. Lambert	111
—— &c of Plymouth v. Werring	440
Mead v. Robinson	422
Meriton v. Stephens	271
Merlott (Tapner d. Peckham v.)	177
Middleton (Lord) v. Forbes	*259
Milburn, Lessee of Doe, v. Salkeld	673
Millechamp v. Johnson	*205
Mills v. Hughes	585
Mopke (Cooper v.)	53
Moone d. Fagge v. Heafeman	138
Moravia v. Sloper	30
Morris (Doe d.) v. Underdown	293
—— (Lloyd v.)	443
Morse v. James	122
Moseley (Edwards v.)	193
Moyse v. Cockledge	636
Mucklestone v. Thomas	146
Murphy v. Fitzgerald	*38
Musgrave v. Cave	319
Myddleton v. Wynn	597

N

Newton v. Walker

315

Norman

TABLE OF THE CASES REPORTED, &c.

Norman v. Beaumont	-	-	-	Page 484
Nottingham v. Jennings	-	-	-	* 166
(Mayor &c of) v. Lambert	-	-	-	111
O	-	-	-	
Omichund v. Barker	-	-	-	338
P	-	-	-	
Pacey (Parnham v.)	-	-	-	332
Padfield v. Cabell	-	-	-	411
Paine (Layng v.)	-	-	-	571
Papworth (Dawes v.)	-	-	-	408
Parkhurst v. Smith	-	-	-	327
Parnham v. Pacey	-	-	-	332
Pearson v. Roberts	-	-	-	668
Peckham (Tapner d.) v. Merlott	-	-	-	177
Pendock v. Mackinder	-	-	-	665
Perritt (Crispe v.)	-	-	-	467
Phylick (Clarkson v.)	-	-	-	184
Plymouth (Mayor &c of) v. Werring	-	-	-	440
Pointer (Rayner v.)	-	-	-	410
Pole v. Fitzgerald	-	-	-	641
Porter (Croffe v.)	-	-	-	181
Powell (Davies v.)	-	-	-	46
(Rowndell v.)	-	-	-	66
Preston d. Eagle v. Funnell	-	-	-	164
Prowse (Childs v.)	-	-	-	331
Q	-	-	-	
Queenborough (Hodgskin v.)	-	-	-	129
R	-	-	-	
Ratborne (Howard v.)	-	-	-	316
Rawlinson (Stone v.)	-	-	-	559
Rayner v. Pointer	-	-	-	410
				Reeve

TABLE OF THE CASES REPORTED, &c.

Reeve (Bennet v.)	- - - - -	Page 227
Reignolds v. Edwards	- - - - -	282
Richards (Dovey v.)	- - - - -	622
——, Lessor of Fenn, v. Marriott	- - - - -	430
Richardson (Smith v.)	- - - - -	20
Roberts (Pearson v.)	- - - - -	668
Robinson (Mead v.)	- - - - -	422
—— v. Tuckwell	- - - - -	183
Roe d. Fulham v. Wickett	- - - - -	303
—— d. Wilkinson v. Tranmarr	- - - - -	682
Rogers (Longmore v.)	- - - - -	288
Rowe v. Tutte	- - - - -	14
Rowles (Ellis v.)	- - - - -	638
Rowley v. Allen	- - - - -	318
Rowndell v. Powell	- - - - -	66

S

Salkeld (Doe d. Milburn v.)	- - - - -	673
Say (Fuller v.)	- - - - -	629
Scot (Legg d. v. Benion)	- - - - -	43
Scott v. Surman	- - - - -	400
Settree (Atkinson v.)	- - - - -	482
Sharp (Jackson v.)	- - - - -	525
Shelley v. Wright	- - - - -	9
Shipman v. Thompson	- - - - -	103
Simpson v. Hartopp	- - - - -	512
Skipp v. Harwood	- - - - -	291
Slater (Bailiffs &c of Litchfield v.)	- - - - -	431
Slaughter v. Talbot	- - - - -	190
Sloper (Moravia v.)	- - - - -	30
Smales v. Waite	- - - - -	* 316
Smith (Brice v.)	- - - - -	1
—— (Parkhurst v.)	- - - - -	327
—— v. Richardson	- - - - -	20
—— (Smithson v.)	- - - - -	461
Smithson v. Smith	- - - - -	ib.
Sollers v. Lawrence	- - - - -	413

d

Southby

TABLE OF THE CASES REPORTED, &c.

Southby (Eaton v.)	-	-	-	Page 131
Spear (Talbot v.)	-	-	-	70
Spinks v. Bird	-	-	-	* 278
Stevens (Meriton v.)	-	-	-	271
Stokes (Harvey v.)	-	-	-	5
Stone v. Rawlinson	-	-	-	559
Storke v. De Smeth	-	-	-	66
Strachan (Martin d. Tregonwell v.)	-	-	-	444
Strickland (Fawcett v.)	-	-	-	57
Stroother (Lambert v.)	-	-	-	218
Sturges (Hutchinson v.)	-	-	-	261
Surman (Scott v.)	-	-	-	400
Swayne (Want v.)	-	-	-	185
Sweeting (Dyke v.)	-	-	-	585

T

Talbot (Slaughter v.)	-	-	-	190
Talbot v. Spear	-	-	-	70
Tapner d. Peckham v. Merlot	-	-	-	177
Tegetmeyer v. Lumley	-	-	-	* 264
Thomas v. Cadwallader	-	-	-	496
—— (Mucklestone v.)	-	-	-	146
—— (Wynne v.)	-	-	-	563
Thompson (Marriot v.)	-	-	-	186
—— (Shipman v.)	-	-	-	103
Thorn (Wray v.)	-	-	-	488
Titely v. Foxall	-	-	-	688
Trahern (Welles v.)	-	-	-	233
Tranmarr (Roe d. Wilkinson v.)	-	-	-	682
Tregonwell (Martin d. v. Strachan)	-	-	-	444
Trevett v. Aggas	-	-	-	107
Tribe v. Webber	-	-	-	464
Tuckwell (Robinson v.)	-	-	-	183
Tuke (Haldenby v.)	-	-	-	632
Tully (Davies d. v. Hamlin)	-	-	-	612
Turner (Bullythorpe v.)	-	-	-	475
—— v. Horton	-	-	-	438
				Tutte

TABLE OF THE CASES REPORTED, &c.

Tutte (Rowe v.)	-	-	-	Page 14
Twells v. Colville	-	-	-	375

U

Underdown (Doe d. Morris v.)	-	-	-	293
------------------------------	---	---	---	-----

V

Verney (Jones d. Cowper v.)	-	-	-	169
Vernon (Acherley v.)	-	-	-	153

W

Waite (Smales v.)	-	-	-	* 316
Walker (Hickman v.)	-	-	-	27
Walker (Newton v.)	-	-	-	315
Want v. Swayne	-	-	-	185
Ward v. Crefwell	-	-	-	265
Wardell (Bell v.)	-	-	-	202
Warner (Johnson v.)	-	-	-	528
Warren (Baker v.)	-	-	-	* 238
Weare (Weavers' Company v.)	-	-	-	* 288
Weavers' Company v. Weare	-	-	-	* <i>ib.</i>
Webber (Tribe v.)	-	-	-	464
Welles v. Trahern	-	-	-	233
Werring (Mayor &c of Plymouth v.)	-	-	-	440
Wheeler v. Horne	-	-	-	208
White (Ginger d. White v.)	-	-	-	348
Whitred (Austin v.)	-	-	-	623
Wickett (Roe d. Fulham v.)	-	-	-	303
Wiglesworth (Drake v.)	-	-	-	654
Wilkinson, Lessor of Roe, v. Tranmarr	-	-	-	682
Wilks (Broadbent v.)	-	-	-	360
Williams v. Drewe	-	-	-	392
—— (Mayor of Bedford v.)	-	-	-	608
Wilson (Johnson v.)	-	-	-	248
Winsmore v. Greenbank	-	-	-	577

TABLE OF THE CASES REPORTED, &c.

Wodhull (Goodtitle d. Crofs v.)	-	-	592
Wood (Goodtitle d. Gurnall v.)	-	-	211
Wray v. Thorn	-	-	488
Wright (Shelley v.)	-	-	9
Wynn (Myddleton v.)	-	-	597
Wynne v. Thomas	-	-	563

Y

York Archbishop of (The King v.)	-	-	533
----------------------------------	---	---	-----

J U D G E S
OF THE
COURT OF COMMON PLEAS
DURING THE TIME OF THESE REPORTS.

EASTER, 10 GEO. II. 1737.

WILLES, Lord Chief Justice.

DENTON,

COMYNS,

J. FORTESCUE ALAND.

} Justices.

On the 7th of July 1738, 12 Geo. 2., Mr. Baron (*William*) *Fortescue* was appointed to a seat on the Bench in this Court in the room of Mr. Justice *Comyns*, who was appointed Lord Chief Baron of the Court of Exchequer.

In the vacation after *Hilary* Term 1739, 40, Mr. Justice *Denton* died, and Mr. Baron *Parker* succeeded him in this Court.

In *Michaelmas* Term 1741 Mr. Serjt. *Burnett* was appointed a Judge of this Court instead of Mr. Justice *William Fortescue*, who was made Master of the Rolls.

In *Michaelmas* Term 1742 Mr. Justice *Parker* was appointed Lord Chief Baron of the Court of Exchequer, and Mr. Baron *Abney* came into this Court.

In *Trinity* Term 1746 Mr. Serjt. *Birch* was appointed a Judge of this Court in the room of Mr. Justice *J. Fortescue Aland*.

In *Easter* Term 1750 Mr. Justice *Abney* died, and he was succeeded here by Mr. Serjt. *Gundry*.

In *Hilary* vacation 1754 *H. Batburs* Esq. one of his Majesty's counsel was appointed a Judge of this Court in the room of Mr. Justice *Gundry*.

In *Hilary* vacation 1757 Mr. Justice *Birch* died; and in the following Term *W. Noel* Esq., one of his Majesty's counsel, succeeded him in this Court.

ERRATA.

- Page 9, 10, 11, 12. 28 marg. for "1773" read "1737"
 16 l. 25, for "holdeu" read "holden"
 82 — 15, dele "out"
 119 — 6 and 7, for "Deant" read "Defendant"
 178 — 2, for "out" read "and"
 228 — 7, for "devise" read "demise"
 249 — 3, for "portion" read "partition"
 257 note (a) l. 14, for "administration" read "administrator"
 317 note l. 34, 35, for "arbitrator" read "administrator"
 332 l. 7, for "benignæ" read "benignè"
 375 note l. 22, for "inquiry" read "injury"
 381 marg. for "1724" read "1742"
 384 l. 15, for "plaintiff" read "plaintiffs"
 505 — 4, dele "of"
 510 — 17, for "it" read "set"
 584 — 7, for "on the" read "of the"
 586 marg. for "1754" read "1745"
 587 note 1, for "Wils." read "Willes"
 600 l. 23, for "ought not to be" read "ought to be"
 635 note 1, l. 9 and 10, for "removed" read "recovered"
 645 l. 20, for "Clericoe" read "Cleirac"
 661, 662, 663, 664, marg. for "1752" read "1752, 3."

C A S E S

ARGUED AND DETERMINED

IN THE

COURT OF COMMON PLEAS,

cc. cc. cc.

BRICE *against* SMITH.

[M. 8 GEO. II. Roll 1283.]

1737.

Friday,
May 20th.

THE opinion of the Court was thus delivered by

Willes, Lord Chief Justice. "In formedon. This cause was spoken to the last term (a).

The action was brought by *Philip Brice* against *Gerard Smith* for four messuages and one acre of land in *Old Brentford*. The cause was tried before Lord Ch. Just. EYRE 17th February, 8 Geo. 2; and a verdict was given for the plaintiff, but a case was reserved for the opinion of the Court on these points;

First, Whether there was sufficient proof of the will of *Philip Brice*, the grandfather of the plaintiff, under whom he claimed, in the declaration he only set forth the devise, not the condition, and held to be no objection. The attestation of a will of land need not state that the witnesses subscribed their names in the presence of the testator.

(a) By *Hawkins* Serjt. for the plaintiff and by *Chapple* King's Serjt. for the defendant; it had been argued before by

Wright Serjt. for the former and *Eyre* King's Serjt. for the latter.

B

by

Under a devise to A. and his heirs for ever, and if he die without issue then to his right heirs, A. takes an estate-tail. *Sp. acc. Com. Rep.* The plaintiff in formedon claimed under a devise, to which was annexed in the will a condition to pay a sum of money; no objection.

1737.

BRICE
against
SMITH.

by reason that the witnesses were all dead, and it was not said in the attestation that they subscribed their names in the presence of the testator.

Secondly, Whether the title described in the declaration was agreeable to the devise; the devise under which the plaintiff claimed being on condition, and the condition being omitted in the declaration.

Thirdly, Whether the words of the will created an estate-tail in *Philip* the father of the demandant.

The two first points have been already determined by the Court, that the will was well proved, and that the title was sufficiently described. They were determined before I came on the bench, but I am clearly of the same opinion. The last point was so determined in the case of *Head v. Jones, Tr. 1736, B. C.*

As to the third: that remains to be considered, and it depends entirely on the construction of the will of *Philip Brice* the grandfather, bearing date the 28th of *July* 1683. The words of the will, so far as they relate to the present question, are "I give and devise unto my son *Philip Brice* (who was the father of the plaintiff) all that my freehold messuage or tenement and so much of the freehold belonging thereunto as doth lie from the stakes there driven into the ground and fastened into the river there on the east (which are the premises in question) from and after the decease of my wife *Margaret* unto the said *Philip Brice* my son and his heirs for ever, on this condition that he shall pay unto my son *William Brice* 30*l.* within one year after the death of my wife; and in case he shall not pay the said 30*l.*, then I give the same unto my son *William Brice* to enjoy the rents and profits until he be fully satisfied his said 30*l.* and no longer." Then he gives several other tenements to several other of his sons and their heirs for ever. Then follows this clause; "Item my will and mind is that in case any of my said children, unto whom I have bequeathed any of my real or copyhold estates, *shall die without issue*, then I give the estate of him or them so dying unto his or their right heirs for ever."

The question is whether by these words *Philip*, the devisee, had an estate in fee or in tail? and this was divided into two questions;

1737.
BRICE
against
SMITH.

1st, Whether he would have had an estate-tail in case the remainder had been devised over to a stranger? 2dly, Whether devising it over to the right heirs of the person so dying without issue makes any difference?

As to the first question; it cannot be doubted now, after so many solemn resolutions, but that if a man devise an estate to *A.* and his heirs, and afterwards in his will give his estate to another in case *A.* dies without issue, the subsequent words reduce *A.*'s estate only to an estate-tail, and restrain the general word "heirs" to signify only "heirs of the body." So likewise if a man devise an estate to *A.*, or to *A.* for life, without saying more, and afterwards in the same will devise the estate to another in case *A.* dies without issue, these subsequent words will enlarge *A.*'s estate by implication and give him an estate-tail. And this is founded upon these known rules, that the intention of the testator shall always take place in the construction of wills so far as it can be collected from the will itself, and if it be not contrary to the rules of law; and that the priority or posteriority of words in a will (*a*) is not at all regarded, but that the whole will must be taken together to find out the intent of the testator. The cases of *Soulle v. Gerrard* reported in *Cro. Eliz.* 525, *Dutton v. Engram* reported in *Cro. Jac.* 427, and *Whalley v. Reede* and *Hall* in 1 *Lutw.* 804 and 811, cited by my Brother *Hawkins* counsel for the plaintiff, and many other cases that might be cited, are cases express to this purpose. But this point has been now so often determined that my Brother *Chapple*, who was counsel for the defendant, did not seem much to dispute it.

2dly, But he seemed chiefly to rely on this distinction that though it would have this construction in case the remainder had been devised over to a stranger, it will be otherwise in the present case, because the remainder is devised over to the

(a) The same rule also obtains in the construction of deeds, *Dougl.* 690. 3d ed.

heirs

1737.

BRICE
against
SMITH.

heirs of the person so dying without issue (a). But this distinction, though it seems at first to be of some weight, when considered makes no difference either in reason or law. Even in grants, where words are construed much stricter than in the case of a will, if there be words that create an estate-tail, the grantee will have an estate-tail, though the *next* remainder be limited to his heirs. And nothing is more common in settlements than to limit an estate to a man and the heirs of his body, remainder to his right heirs; and for this plain reason, to prevent his disinheriting his issue except by some solemn act done in his life-time. If so plain a point wanted the authority of any cases, the case of *Turnman v. Cooper*, *Cro. Jac.* 476. and several cases mentioned in 2 *Rol. Abr.* 66 and 68, are cases in point to this purpose. It is said in *Co. Lit.* 21 and in *Altham's case* 8 *Co.* 148. that if a man by deed grant an estate to a man and his heirs to hold to him and the heirs of his body, he shall have only an estate-tail, and not even a fee-simple expectant unless the remainder be limited to his heirs: but that if it be granted to one and the heirs of his body to hold to him and his heirs, he shall then have an estate-tail and a fee-simple expectant. And the present case arising on the words of a will is much stronger as to this construction.

We are therefore all of opinion that *Philip* the father of the demandant took only an estate-tail by the words of the will, and consequently that the verdict being for the demandant but the *postea* being stayed till the opinion of the Court was had it must now be delivered to the demandant, in order that he may enter up his judgment (b)."

(a) By the words "die without issue" the deviser must either have meant, "dying without heirs of the body," or without "heirs generally:" but to suppose that he used those words in the latter sense would be to suppose that he intended to devise the lands "to his son *P. Brice* and his heirs for ever, and if he die without such heirs then to the same heirs." There seems therefore less doubt respecting the deviser's intention in such a case than in the ordinary case of a limitation over to a stranger after "a dying without issue by the first taker."

(b) This case is reported in *Com. Rep.* 539. and 2 *Eq. Ca. Abr.* 317. pl. 32: but no notice is taken of the second point of this case in either of those reports, nor do the reasons given by the Court there appear. There is also a little inaccuracy in them both in the first point, in saying that "no subscription was signed sealed and published &c, but only the names of the witnesses subscribed;" the attestation was thus "Signed sealed published and declared by the said testator to be his last will and testament in the presence of us, J. T., J. T., P. H."

WILLIAM HARVEY *against* GEORGE STOKES.

[E. 7 GEO. 2. Rol. 934.]

THE opinion of the Court was thus given by

Willes Lord Chief Justice. "This comes on upon the defendant's demurrer to the plaintiff's replication.

Debt on a bond for 150*l.* entered into by the defendant to the plaintiff as sheriff of the county of *Essex* 3d of *March* 1732.

The defendant prays oyer of the condition, which is that "if the above bounden *Rebecca Stokes* shall appear at the next county court to be holden at *Witbam* or elsewhere in the said county of *Essex*, and then and there do prosecute her action with effect against *Thomas Hawkins* gentleman for taking and unjustly detaining her cattle goods &c, and do also make return thereof, if return thereof shall be adjudged by law, and also do save harmless and indemnified the said sheriff his under-sheriff deputies and bailiffs touching and concerning the replevying and delivery of the said cattle &c, then this obligation to be void &c." And pleads that the plaintiff ought not to have his action against him, for that *Rebecca Stokes* in the condition named did appear at the next county court held after making the said bond viz. 13th of *March* 1732, and then and there did prosecute her action with effect against the said *Thomas Hawkins* in the said condition mentioned for taking and unjustly detaining her said cattle goods and chattels in the same condition mentioned, and that no return thereof was adjudged; and also that the said sheriff his under-sheriff deputies and bailiff or any of them have not been damnified touching or concerning the replevying or delivery of the said cattle goods and chattels or any of them; and this he is ready to verify; wherefore he prays judgment &c.

The plaintiff replies that the plaint and action in the said condition mentioned were afterwards, to wit, on the *Morrow of the Ascension* of our Lord in the sixth year of the reign of his

C

present

1737.

Easter Term,
10 Geo. 2.Saturday,
May 21st.

To debt on a replevin bond, defendant pleaded that A. (the party replevying) did prosecute his suit with effect, and that no return of the goods was adjudged to B. (the party distraining:) plaintiff replied that a return was adjudged to B., nevertheless the said B. did not make return &c. "and this he is ready to certify &c;" special demurrer, for that the plaintiff had not verified his replication: —Held, 1st, that *certify* should be taken to mean *verify*; and that even no verification was necessary, it being in the negative; 2dly, that the mistake of the name of B. for A. was fatal, and might be taken advantage of on demurrer, though not assigned as cause of demurrer. Com. Rep. 566. S. C.

1737.
 HARVEY
 against
 STOKES.

present Majesty removed by his Majesty's writ of recordari into his Majesty's Court of Common Pleas, and thereupon such proceedings were had in this court that afterwards, viz. in *Trinity* Term sixth and seventh of his said Majesty's reign by reason of the default of the said *Rebecca*, it was considered by this Court that the said *Rebecca* and her pledges of, prosecution in that behalf should be in mercy, and that the said *Thomas Hawkins* should be without day, and that he should have return of the cattle goods and chattels aforesaid, as by the record thereof remaining in this court here doth more fully appear; and therefore the said *Rebecca* did not prosecute her action with effect; *nevertheless the said Thomas did not make return of the said goods and chattels according to the tenor of the said condition of the said bond*; and this he is ready to *certify*; wherefore he prays judgment &c.

The defendant demurs; and for cause of demurrer shews that the said William hath not verified his said replication, and for that the replication is uncertain and without form.

Two objections (a) were taken by the counsel for the defendant;

First, that the replication does not conclude rightly; it being, "and this he is ready to *certify*," instead of "this he is ready to *verify*;" and this is assigned as cause of demurrer.

Secondly, that the breach assigned in the replication is, *Thomas* did not make return of the said cattle goods and chattels according to the tenor of the condition of the said bond, instead of *Rebecca*. This is not shewn as a cause of demurrer, but was insisted on as matter of substance.

At the time when this matter was spoken to the Court were of opinion that the first objection was of no weight; for that *certificare* should be taken to signify the same as *verificare*; and for that this part of the replication need not be verified by the plaintiff, it being in the negative; according to the rule in *Co.*

(a) This case was argued on *Friday* | support of the demurrer and *Wright* Serjt.
 May 13th by *Parker* King's Serjt. in | against it.

Lit. 303. *a.* which was cited at the bar. And I will add this further reason why this is well enough, because it is one of those defects which are expressly cured after verdict by the statute 16 & 17 *Car.* 2. *c.* 8., and upon a demurrer by the 4 & 5 of *Anne* *c.* 16. (*a*)

1737.

HARVEY
against
STOKES.

But as to the second exception, it seems to be of great weight, and to be matter of substance and not of form; for that part of the replication where *Thomas* is mistaken for *Rebecca* is the only breach that is assigned to maintain the plaintiff's action, and therefore may be insisted on by the defendant, though not shewn as cause of demurrer.

But it was said that it is helped either by the statute 8 *Hen.* 6. *c.* 12. and *c.* 15, or by the 16 & 17 *Car.* 2. *c.* 8., or the statute 4 & 5 *An.* *c.* 16. for the amendment of the law. But on consideration we think that it is such a defect as is not cured by any of these statutes. It is said in *Blackmore's* case, 8 *Co.* 162. that there are fourteen misprisions, to which the statutes of *Hen.* 8. do not extend, and one of them is a "Jeofail or insufficient pleading or any other default of the party or his counsel," for those statutes extend to misprisions of clerks only; and this seems directly to be the present case. The case in *Cro. Jac.* 13. *Philips v. Rice Hugre* is exactly agreeable to this. Error on a judgment in C. B. in audita querela. The question was concerning an annuity payable to one *John Bush* at a certain time and place; the plaintiff insisted that he tendered the annuity but that *John Bush* was not there to receive it; defendant, protestando &c, pro placito *idem John Bush dicit* that he was there to receive it; the plaintiff demurred; held that it was no plea, for that it was pro placito *idem Johannes BUSH dicit*, instead of *RICE*; it was urged that these words "*idem Johannes Bush*" were void words, and amendable, the plaintiff not having assigned it for cause of demurrer. But, per Curiam, it is not amendable, because it is the substance of the plea, and not the misprision of a word only; and, as it is, there is no plea at

(*a*) But quære; it being "specially shewn for cause of demurrer." See 4 *An.* *c.* 16. *f.* 1.

1737.
 HARVEY
 against
 STOKES.

all (a). There is a like case in *Cro. Jac.* 587; *John Thomas* executor of *Nicholas Joyce v. Willoughby*. Assumpsit. Promise laid that, in consideration that he the said *Nicholas* would deliver unto him (the defendant) on request 40*l.*, he would repay it on such a day; and the declaration was, quod idem *Nicholaus* in facto dicit quod ipse idem *Nicholaus* delivered to him the 40*l.* &c. Non assumpsit pleaded, and verdict for the plaintiff. But judgment was arrested; for though it was said that this was the mistake of the clerk only, "yet it was resolved that it could not be amended, for that it was the very substance of the declaration, and no precedent fact to induce thereto; and that it was not a case where the issue is between *John* and *William*, and the issue is quod idem *Johannes* petit quod inquiretur per patriam, et prædictus *Johannes* similiter; for that is merely the default of the clerk, where he had a precedent record to guide him how he should join issue." But here it is the default of the plaintiff in his replication. The cases of *Birton v. Mandel* reported in *Cro. Jac.* 67, and by another name in *Yelverton* 65, *John Vita v. James Vita*, *Cro. Eliz.* 435; *Coston v. Coston*, *Cro. Eliz.* 752; and *Russell v. Grange*, *Cro. Eliz.* 904; are after a verdict, and only a mistake of the plaintiff's name for the defendant's; so do not come up to the present case. And so are the cases of *Leefer v. West*, *Cro. Jac.* 444., and *Meredith's case*, 1 *Ventr.* 217. (b), which were cited for the plaintiff by Serjt. *Wright*. The case of *Rex v. Barnes*, 2 *Lev.* 117. comes nearer to the present case, it being on a demurrer: but there it was only the mistake of the plaintiff's name for the defendant's, which is very different from the present case.

It remains therefore only to be considered whether this defect be helped either by the statute 16 & 17 *Car.* 2., or by the statute 4 & 5 *Anne*. The statute 16 & 17 *Car.* 2. only cures defects after a verdict, and only where the christian or surname of the plaintiff or the defendant, demandant or tenant, is mistaken, where it is right in any part of the preceding roll or record;

(a) See also *Britton v. Cole*, *Carth.* 443. | *Com. Rep.* 250, and *Blacklock v. Mariner*,
 (b) The cases of *Abraham v. Bunn*, | *ib.* 557. are of the same description.

So it does not extend to the present case; and would not (I think) have cured this even if after a verdict, because here it is not the name either of the plaintiff or the defendant that is mistaken. The statute 4 & 5 *Anne* seems only to extend to such cases as were helped after a verdict by the other statute, and it expressly says that sufficient matter must appear in the pleadings on which the Court may give judgment according to the very right of the cause: whereas no such matter appears upon these pleadings, there being no breach rightly assigned by the plaintiff. There was no case cited for the plaintiff since either of these statutes, but the case of *Lamplough v. Shortridge*, 1 *Salk.* 219., which was cited on the other question, and is nowise material to the present point. And I cannot find any case since the making of these statutes where such a defect as this has been cured.

I could heartily wish that it was in the power of the Court to rectify this mistake: but we think that it is not, and are all of opinion that by reason of this mistake judgment must be for the defendant."

Judgment for the defendant.

CHARLES SHELLEY *against* GEORGE WRIGHT.

THE opinion of the Court was delivered as follows by

Willes, Lord Chief Justice. "Debt on a bond dated 14th of May 1735 in 400*l.*

The defendant prayed oyer of the bond, and condition, which condition was thus; that whereas the above-bound *G. Wright* has been employed under the above-named *C. Shelley* in the office of Auditor of *Lincoln Nottingham Derby and Chester*, and in the office of Auditor of the Alienation-office, and has re-

had received divers sums of money for the obligee which he had not brought to account but acknowledged that a balance was due to the obligee, it was holden that the obligor was estopped to say that he had not received any money for the use of the obligee.

Where a defendant pleads matter of excuse that admits a non-performance (except in the case of an award) the plaintiff need not assign a breach in his replication.

When a plaintiff replies that the defendant is estopped to plead his plea, he may demand judgment generally.

D

ceived

1773.

HARVEY
against
STOKES.

Trin. 10 & 11
Geo. 2.

Wednesday,
June 29th.

A party, executing a deed, is estopped by the recital of a particular fact in that deed to deny such fact.

—Therefore where it was recited in the condition of a bond that the obligor

1773.

SHELLEY
against
WRIGHT.

ceived sundry sums of money in the said several offices as fees and perquisites due to the said *C. Shelley* as Auditor, and for which the said *G. Wright* has not yet brought any account to balance, but doth hereby acknowledge that there is a balance due to the said *C. Shelley* for money received at divers times by him the said *G. Wright* in the said *C. Shelley's* office as Auditor, and for which he doth hereby acknowledge himself indebted, and doth hereby oblige himself his heirs executors &c. to pay the said balance to the said *C. Shelley* his executors &c, and the said *G. Wright* doth propose this obligation as a security to the said *C. Shelley* for the several sums of money so due to him as aforesaid, if therefore the said *G. Wright* his heirs &c, do and shall make and deliver unto him the said *C. Shelley* a true and particular state of all the fees perquisites &c. which he hath received in the said offices for the use and as the dues of the said *C. Shelley*, and pay unto the said *C. Shelley* his executors &c, the balance thereof, or give him other legal security for the payment thereof within one month, and also shall deliver &c all books papers &c upon request, then this obligation to be void, but if default shall be made in all or any of the clauses or agreements aforesaid then to remain in full force.

First, there was a plea in abatement, which was overruled on a demurrer (a), and the defendant was ordered to answer over; and thereupon

He pleaded that the plaintiff ought not to have his action against him, for that he the said *George* [the defendant] before the suing forth of the original writ had not received any fees perquisites &c in the aforesaid offices or any of them for the use and as the dues of the said *C. Shelley*, and insisted on some other matters (b) not material to the points in question.

The plaintiff replied that the said *George* ought not to be admitted or received to plead the plea above by him pleaded as to

(a) See an account of that part of the case in *Com. Rep.* 562, and *Barnes* 338. | answer to the other parts of the condition of the bond.

(b) Which were pleaded by way of

so much thereof wherein he pleads that before the suing out of the original writ of the said *Charles* he the said *George* had not received any fees perquisites or profits in the said offices or any of them for the use and as the dues of the said *Charles*, because he says that before the suing out of the said original writ, to wit, on the said 14th of *May* 1735 the said *George* by the said condition subscribed to the said writing obligatory sealed with his seal as aforesaid acknowledged that he had received fundry sums of money in the said several offices in the condition mentioned as fees and perquisites due to the said *Charles* as Auditor as aforesaid, and for which the said *George* had not then brought any account to balance, but thereby acknowledged that there was a balance due to the said *Charles* for monies received at divers times by him the said *George* in the said *Charles's* offices as Auditor as aforesaid, and for which he thereby acknowledged himself indebted and thereby obliged himself his heirs &c to pay the said balance unto the said *Charles* his executors &c; which said writing obligatory with the condition subscribed the said *George* doth not deny nor to it sufficiently answer; and this he is ready to verify; wherefore he prays judgment if the said *George* ought to be admitted and received against his own acknowledgement by his deed aforesaid to plead the plea by him above-pleaded that he hath not received any fees perquisites &c in the said offices or any of them for the use and as the dues of the said *Charles* as aforesaid.

1773.
SHELLEY
against
WRIGHT.

To this the defendant demurred generally, and the plaintiff joined in demurrer.

Hawkins Serjt., and *Comyns* Serjt. for the defendant.

Skinner Serjt., and *Parker* Serjt. for the plaintiff.

Three objections were taken by the defendant to the plaintiff's replication;

First, That no one can be estopped by a recital.

Secondly, That there is no breach assigned.

Thirdly, That no judgment is prayed.

First; As to the Estoppel. There are some general sayings in the books that no one shall be estopped by a recital;

1773.
SHELLEY
against
WRIGHT.

as in *Co. Lit.* 352. b.: but the reason there given is "because it is no direct affirmation". And in 1 *Roll. Abr.* 870 and 872. which were cited for the defendant, there are some few cases in which it was holden that a man shall not be estopped by a recital: but there are more cases there in which it was held that he may be estopped; and in 872 there is a distinction laid down that a person shall not be estopped by a *general* recital, but shall by the recital of a *particular* thing. Accordingly there are several cases there parallel to this (only the recitals are not quite so strong) where it was held that the party is estopped. And so likewise it is held in *Cro. Eliz.* 756, 757, *Willoughby v. Brook*, and in *Hart and Buckminster*, in *Styles* 103, reported also in *Alleyn* 52, that the recital in the condition of a bond of a particular indenture, or of a particular sum due, is an estoppel to plead that there is no such indenture or no such sum due(a). And it is said in 2 *Leon.* 11., an anonymous case, that where the recital is material the party shall be estopped; and it is certainly material here, for it is the very foundation of the whole. The reason likewise, which is laid down in *Co. Lit.*, why a recital ought not to estop plainly does not hold in the present case; for here is a direct affirmation of the matters which are insisted on as an estoppel in the replication.

We are therefore of opinion that the defendant is estopped to say that he hath not received any fees perquisites &c, as in the replication.

As to the second objection: Several cases have been cited to shew where a breach is necessary and where not. But it is not necessary to take particular notice of them or to make observations upon them, because the rule so far as relates to the present case is plainly laid down in the case of *Meredith v. Alleyn*, *Salk.* 138, and *Cartbew* 115, that in all cases where a man pleads a matter of excuse which admits a non-performance (except in the case of an award which stands on a particular ground) the plaintiff need not assign a breach in his replication, but otherwise where a man pleads a performance. This rule has never been departed from since; and the reason of it seems

(a) See also 21 *Edw.* 4. 54. b; *Cro.* | *Cullingworth's case*, *Godb.* 177. S. P.; and *Eliz.* 362; *Paine v. Sheltrappe*, *All.* 13; | *Coffens v. Coffens*, *post*, *M.* 11 *Geo.* 2.

to be plain, because the defendant after such plea pleaded cannot insist upon performance without a departure in pleading, and this is the present case. The performance here is the paying or giving security for the money due on the balance; by insisting therefore that there was nothing due on the balance the defendant admits a non-performance, and only endeavours to excuse it by saying that nothing was due. There is no pretence here to say that the defendant insisted on a performance. Besides in this case the defendant being estopped to plead this plea, it is just the same as if he had not pleaded at all; and then to be sure no breach need have been assigned. The plaintiff might have demurred to the defendant's plea instead of replying, and might have insisted on the estoppel in his demurrer, and then would have had judgment on his demurrer without assigning a breach, there being sufficient in his declaration to be a foundation for judgment.

1737.
SHELLEY
against
WRIGHT.

We think therefore likewise that there is no weight in this objection.

As to the third objection, that judgment is not rightly prayed; there have been several cases cited to shew that judgment has been prayed otherwise, and if it had been so here, it would not have been wrong.

But we think that it is the best way to plead it in this manner, and to rely on the estoppel; and so it is said in *Co. Lit.* 303. b. And so are the best precedents (a). And it seems by the cases of *Pitt v. Knight*, 1 *Lev.* 222. and 1 *Sid.* 329, and of *Barnes v. Gladman*, 2 *Lev.* 19, that if the plaintiff had only demanded judgment generally, without saying any thing more it had been sufficient; as he has done here; and the rest, if unnecessary, may be rejected as surplusage. Besides, if this were not well pleaded, yet it is certainly aided by the statute 4 & 5 *Ann. c.* 16, it being only matter of form, and not being specially assigned as a cause of demurrer, sufficient matter appearing on the pleadings upon which the Court may give judgment "according to the right of the cause."

We are therefore of opinion that judgment must be for the plaintiff."

(a) Vide 22 *Hen.* 6. 53; *Clift's Ent.* 19; *Rawlins's case*, 4 *Co.* 53. *Lifford's case*, 11 *Co.* 52. a.

1737.

Wednesday,
June 29th.THOMAS ROWE and ANNE his Wife *against* WILLIAM
TUTTE, STEPHEN BRIGGS, and JOHN BARNES.

To trespass,
assault and
false imprisonment,
three defendants
pleaded a joint plea
of justification under
process &c,
in which one
said that he,
as attorney
for the party
suing out
that process,
delivered the
warrant to
the other two
defendants
(to whom it
was directed)
to be executed &c;
and the two
others that
they executed
it &c; and
held a good
plea.

A defendant
may justify a
battery by
pleading
molliter manus
imposuit
&c in order
to arrest &c.

THE opinion of the Court was delivered as follows by

Willes, Lord Chief Justice. "Trespass. First count that the defendants made an assault on *Anne*, and beat wounded and imprisoned her for the space of three days.

Second, that the defendants made an assault on *Anne*, and beat and wounded her, &c, without the imprisonment; by which means the said *Thomas* lost the advice and assistance of the said *Anne* his wife in his domestic affairs for ten days.

Third, that the defendants made an assault on *Anne*, and beat wounded took arrested and imprisoned her for the space of seven days, and until the said *Thomas* paid unto the said *William* *Stephen* and *John* the sum of 50 l. as a fine for the releasement discharge and redemption of the said *Anne*.

The defendants as to the force and arms and the whole trespass in the declaration, except the said assault beating imprisoning and detaining in prison of the said *Anne* in the said declaration first above-mentioned, jointly plead not guilty; and issue is joined thereupon.

And as to the said assault beating imprisoning and detaining in prison of the said *Anne* in the said declaration first above-mentioned the said defendants also jointly plead a writ of rescous teste'd 12th February 9 Geo. 2. returnable before the time when &c issued out of *B. C.*, and directed to the sheriff of *Suffex*, commanding him to take the said *Anne* and another person &c. That the same was delivered to the sheriff before the return thereof, and that he before the return thereof duly made a warrant under the seal of his office directed to the keeper of the gaol of the said county, and also to the said *Stephen* and *John* (the defendants) as his bailiffs, commanding them to take the said *Anne* &c. That the said warrant before the return of the

writ was, by the hands of the said *William Tutte* (the defendant) attorney on behalf of our said Lord the King and the said *Penelope Baker* in the said writ mentioned, delivered to the said *Stephen* and *John* to be executed in due form of law; and that the said *Stephen* and *John* afterwards and before the return of the said writ by virtue of the said warrant *did gently lay their hands* upon the said *Anne* in the bailiwick of the said sheriff in the said county of *Sussex* to take and arrest her, and did then and there take and arrest her, and did keep and detain her for three days next following in their custody, as it was lawful for them to do; which they aver to be the same assault &c.

1737.
 ROWE
 against
 TUTTE.

To this special plea the plaintiffs demur generally; and the defendants join in demurrer.

Two objections were taken (a) to the plea by Serjeant *Gapper* for the plaintiffs,

First, that *William Tutte*, one of the defendants, hath not justified; and that, as it is a joint plea, if it be bad as to one defendant, it must be bad as to all.

Secondly, that a plea of *molliter manus imposuit* will not justify a battery.

As to the first objection; We admit the rule as to the joint (b) plea, but are of opinion that *William Tutte* hath justified as well as the other two.

The objection is that he hath not admitted the trespass which every one that will justify must do. But it is plain that he hath; for it is pleaded that he delivered the warrant as attorney for the plaintiffs to the other two defendants to be executed in due form of law, which (if true) if he had pleaded the general issue it must have been found against him; for he who com-

(a) It appears that this case was argued on *Wednesday May 4th 1737.* | 1737; and *Morse v. James*, *post*, M. 1738.
 (b) Vide *Moravia v. Sloper*, *post*; M. | S. P.

1737.

Rowe
against
Tuttle.

mands or directs another to do a trespass is guilty of the trespass if done by the other person pursuant to his direction (a).

As to the second objection: the cases, which were cited on the part of the plaintiff out of 2 *Rol.* 546., to prove that this is not a good plea, rather prove the contrary. In the cases cited out of *Cro. Eliz.* 93, and 268, it is either pleaded to the wounding or only to the rest of the trespass, and the wounding is not traversed. But in the present case the wounding is traversed, and the plea is only to the rest of the trespass. In the case of *Carr v. Donne*, 2 *Vent.* 193., cited for the plaintiff, no such thing is adjudged: but judgment is against the defendant only because he had not pleaded this plea to the battery but only to the assault and imprisonment; which seemed to imply that, if he had pleaded it to the battery, it had been a good plea (b). In the case of *Patrick v. Johnson*, as reported in 3 *Lev.* 403, judgment is given upon other points: and what is said there concerning this plea is said obiter, and shews (I think) rather that it is good; for it is said there that every laying on hands is a battery unless it be excused. The only case that seems to look the other way is the same case of *Patrick v. Johnson*, as reported by *Lutwyche* fo. 925 and 929. But that case is there very doubtfully reported: and he seems to rely chiefly on a case of *Stoney v. Calvert*, which I cannot find, and which is contrary to all the other cases. And in the end of the report he admits (c) that it was holden to be a good plea by Chief Justice *Rede* as long ago as 21 *Hen.* 7. I believe there have been several hundred precedents since in the same form; it being the common way of pleading it. *Lutwyche* concludes his report thus, in tantâ varietate opinionum quære meliorem; and we think that the opinion of those who hold this plea to be good to be the best, not only as it is agreeable to reason and a great ma-

(a) Vide *Britton v. Cole*, *Salk.* 409. S. P. and *Moravia*, v. *Sloper*, *post M.* 1737.

(b) Vide *Girling's case*, *Cro. Car.* 446, 7; *Marpole v. Basnett* and *Murphy v. Fitzgerald*, cited in *Moravia v. Sloper*, *post*.

(c) *Lutwyche* who was counsel in that case, and who appears much displeased with *Levintz* for the manner in which the latter had reported it, after combating *Levintz's* assertion, admitted that there were many precedents of pleading like that in *Patrick v. Johnson*.

jority

majority of the precedents, but likewise because it is so expressly adjudged in a very modern case; the case of *King* and wife against *Tibbert* in *B. R. 5 W. & M. Skinner* 387. (a)

1737.
Rowe
against
Tibbert.

As to the case of *Williams v. Jones*, cited for the plaintiffs, and said to be in *B. R. Tr. 10 Geo. 2. (b)*; but very little can be collected from it: The counsel could not agree in the state of it, but all agreed that this was not the point in question, but that the only question was whether cepit et arrestavit would justify a battery, as not (in the opinion of the Court) necessarily implying

(a) Also reported in *Comb. 227.* by the name of *King and Wife v. Peppard.*

(b) That case has been since reported in *2 Str. 1049.* and *Cas. Temp. Hardw. 298*: there the arrest was pleaded as a justification to the battery, and the Court held the justification to be insufficient. But according to the report of it in the latter book, in which alone the reasons of the Court appear, Lord Hardwicke Chief Justice said "Upon consideration of the cases we are of opinion that a battery cannot be justified by shewing an arrest barely, but that in order to make it good something further should be shewn, as that the defendant gently laid his hands in order to arrest and did arrest him, as in the case of *Patrick v. Johnson*, though that way of pleading has been doubted of; or else that the plaintiff made resistance and was going to rescue himself, and by reason of that he beat him to take him."

Indeed in *Truscott v. Carpenter*, 1 *Ld. Raym. 229.* the Court said "where an express battery is laid, it is not enough to justify the imprisonment upon legal process which includes a battery, but the defendant ought to go on and shew that he arrested the plaintiff and the plaintiff offered to rescue himself, and so the defendant was compelled to beat him; for otherwise if it be not on some such occasion a man cannot justify a battery in an arrest." But it is to be observed that in that case the justification was not pleaded with a molliter manus imposuit, as it was in *Patrick v. Johnson* and in the principal case here.

In *Bull. N. P. 19.* the true distinction is taken, "an officer cannot justify more than the assault by virtue of an arrest, without shewing that the plaintiff resisted or endeavoured to rescue himself, unless it be by way of molliter manus imposuit, and in that manner he may justify the beating without shewing any resistance or attempt to rescue." Vide *Titley v. Foxall*, post, *Tr. 1758.*

In this case however, as well as in the case of a plea of resistance or an attempt to rescue, it is competent to the plaintiff to reply an unjustifiable or a subsequent battery, as suggested by *Kingsmill* Justice in the case in *21 H. 7.* "que puis cel metter de ses mains le defendant batit le plaintiff."

A defendant may also justify an assault and battery in the defence of his possession of lands or goods, by pleading molliter manus imposuit &c; *Bro. Abr. "Tresp. pass."* pl. 128; *2 Rol. Abr. 548.* pl. 2; and *549.* pl. 9, 10; and *2 Inst. 316.* If actual force be used, the defendant may resist force by force; *Green v. Goddard*, *Salk. 641*; and *Weaver v. Bush*, *8 Durnf. and East 78*; and according to the latter case he need not plead molliter manus imposuit &c. There, to trespass for an assault and battery the defendant pleaded that the plaintiff with force and arms and with a strong hand endeavoured forcibly to break and enter the defendant's close, whereupon the defendant resisted and opposed such entrance &c, and if any damage happened to the plaintiff it was in the defence of the possession of the said close; and it was holden to be a good plea.

F

laying

1737.

Rowe
against
TUTTE.

laying on hands, which seems rather to imply that this plea is good. But, be that case as it will,

We are all of opinion, for the reasons aforesaid, that the defendants' plea is good, and that judgment ought to be for the defendants."

Friday,
Nov. 11th.
Mich. 11 G. 2.

ANDREW CROSSE, HENRY CROSSE, and WILLIAM KROGER, *against* RICHARD PORTER (a).

If it do not appear on the record that there is a condition to a recognizance, on which an action is brought, the Court will not intend that there is any condition.

"DEBT on a recognizance entered into by the defendant to the plaintiffs and one *T. Chancy* deceased in the sum of 537*l.* before the Lord Chief Justice on the 12th of *November* 10 *Geo. 2.* The recognizance as set forth in the declaration is absolute, without any condition; at least none appears. The breach assigned is that the defendant did not pay the said sum to the plaintiffs and *T. C.* in his lifetime, nor to the plaintiffs after his death, but hath refused and still doth refuse to pay the same, though often requested. Damage 20*l.*

A general demurrer by the defendant, and the plaintiffs join in demurrer.

Comyns Serjt. for the defendant alleges two reasons why the plaintiffs cannot have judgment.

1st, They have not set forth the condition of the recognizance;

2dly, No breach is assigned.

First; It is held necessary in the case of a recognizance, though not in the case of a bond with a penalty, because the recognizance and condition make but one entire record. He cited the case of *Atterbury v. Ward* (b), *B. C.*: there nul tiel record was pleaded, and so the condition appeared; and the case

(a) This case is shortly reported in *Barn.* 339. 4to edit. (b) Since reported in *Barnes* 60.

of *Loder v. Lowth*, B. C.: but there oyer was prayed, and so the condition was set forth on the record.

1737.

CROSS
against
PORTER.

Draper Serjeant for the plaintiffs. The Court cannot suppose a condition. It may be an absolute recognizance; and so it appears to be as set forth in the declaration. Secondly, a breach is clearly assigned, viz. non-payment.

Per Curiam.

There may be an absolute recognizance as well as a recognizance with a condition. It does not appear to the Court that this is a recognizance with condition; it must be taken to be an absolute one, since no condition is set forth. We admit that where a condition appears on record it must be set forth in the declaration, because a recognizance and condition make but one record. The cases cited are different from the present; for in the one nul tiel record was pleaded; and in the other oyer of the condition was prayed; and so it appeared to the Court in both cases that there was a condition. The defendant might have pleaded nul tiel record, or prayed oyer in the present case. In the case of a recognizance of bail, if a scire facias be brought against the manucaptors, it appears to be a recognizance with condition, and therefore it is necessary to set forth the condition (a). But that is different from the present case.

Secondly; a breach is plainly assigned, viz. non-payment of the money.

So judgment for the plaintiffs" (b).

(a) So, in debt on recognizance of bail, it should be stated in the declaration at whose suit the defendant became bail and for what; *Park v. Yerbury*, 1 *Wils.* 284.

(b) See also precedents of such declarations as the present in 1 *Bro. Entr.* 164. pl. 28; 29.

1737.

Mich. 11 G. 2.
Monday,
Nov. 14th.In an action
for words
that import
felony or
treason, the
defendant
cannot give
in evidence
the truth of
them on the
general issue.JOHN SMITH *against* JOHN RICHARDSON (a).

CASE. This comes before the Court on a case made by Mr. Baron *Fortescue* at the last *Lent* assizes for the county of *Oxford*, and reserved for the opinion of the Court.

The action was for scandalous words spoken by the defendant of the plaintiff; damages 500*l.* Several sets of words were laid; but the most material ones are, "*John Smith* is a rogue and hath stolen my beer; and *John Smith* has robbed me of my beer." It was laid that the plaintiff was beer butler of the College of *Christchurch* in *Oxford*, and that by reason of the speaking of these words he was not only injured in his reputation but likewise turned out of his place. Verdict for the plaintiff, and damages 160*l.*

The Judge allowed the defendant to give the occasion and manner (b) of speaking the words in evidence: but the defendant, to mitigate the damages, offering to prove the truth of the words, and that the plaintiff was really guilty of the felony mentioned in the declaration, the Judge would not permit it, but reserved this point for the opinion of this Court, whether the defendant could, in mitigation of damages, give in evidence that the plaintiff was in truth guilty of the felony mentioned in the declaration.

When this came before the Court, there were several cases cited by the counsel that bore some resemblance to this case: but there was no case cited in point.

This therefore being a new case, and a case of great consequence, the Court thought proper to desire the opinion of the

(a) This case is shortly reported in *Barn.* 195. 4to edit. in *Com.* 551.; and in *Prac. Reg.* 383.

(b) See *Brook v. Sir H. Montague*, *Cro. Jac.* 90, 91; and *1 Lev.* 82. See the case of *The King v. J. Wright*, 8 D. & E. 298, where it was holden that it is not criminal, or actionable, to publish the proceedings of Courts of Justice or of

either House of Parliament reflecting on the character of an individual, if the publication contain a fair representation of what passed there. The same point was also ruled by the Court of C. B. in the case of *Currie v. Walter*, there cited, though in that case the Court doubted whether the defendant could avail himself of that defence on the general issue.

rest of the Judges not only to guide their own judgment but that there might be an uniformity of opinion for the future in a matter of so great moment. Accordingly the Lord Chief Justice summoned all the Judges to his Chambers in *Serjeants' Inn*, and all of them met there on *Friday* last ;

1737.
SMITH
against
RICHARD-
SON.

And they were all twelve unanimously of opinion that where the words import a general felony, as "thou art a thief," or "thou stolest a horse" or any other thing, not specifying whose it was, or when or where it was stolen, the defendant ought not to be allowed on the general issue to give the truth of the fact in evidence in mitigation of damages.

But in respect to the present case, and where the words import a particular felony, as "he has stolen my beer," there was a variety of opinions amongst the Judges whether such evidence ought to be received or not on not-guilty pleaded. Eight of the Judges were of opinion that in no case whatever, where the words imported felony or treason, such evidence ought to be admitted upon not-guilty pleaded : but four were of opinion that it might, where the words imported a particular felony.

Those, who were of opinion for not admitting such evidence in any case whatever where the words imported felony or treason, were so principally for these reasons ;

First ; They thought that the Judges had gone far enough already in admitting such evidence to be given in mitigation of damages on the general issue which might and ought to be pleaded in bar by the rules of the common law, and thought that it was not proper to go any farther.

Secondly ; That there could be no inconvenience or ill consequence in rejecting such evidence, because the party has an opportunity of pleading it : but that admitting it might be attended with very ill consequences and great injustice to the plaintiff. For even where a particular felony is charged, as in the present case, no one comes prepared to defend himself on not-guilty pleaded, which imports only that he did not speak the

G

words.

1737.
SMITH
against
RICHARD-
SON.

words. In the present case if the defendant were allowed to give in evidence the truth of the words, he might prove that the plaintiff stole his beer twenty or thirty years ago. And how could the plaintiff be prepared to defend himself against such a charge? He may have occasion for an hundred witnesses: if he bring them and the defendant do not go upon this, he will have no costs for such witnesses: if he do not bring them, he may be found guilty of a crime for which he is to forfeit his life without a possibility of defending himself. And the consequence of that will be not only suffering greatly in his reputation, but the Judge may send him over to the other side to be tried for his life. This is inverting the method of trial, and putting a man's life in danger contrary to justice and the known rules of law.

Thirdly; By this mean likewise the plaintiff will lose the advantage of replying, which he might do if this matter were pleaded in bar. He might insist on a pardon (a) or an acquittal, and several other matters, which he might set forth in his replication, if the fact were to be set forth specially in the plea, which defence he will be deprived of if the defendant may be allowed to give it in evidence in mitigation of damages on not-guilty; so the plaintiff will be in a much worse condition than if the defendant had pleaded it, which he ought not to be.

Fourthly; Besides what is called in mitigation of damages, considering the nature of the action, is almost the same as *in bar*; for if the defendant can bring down the damages to less than 40s., the plaintiff recovers no more costs than damages.

Fifthly; By this mean likewise there may be a contrariety of determinations. A man may lose his damages by not being prepared to defend himself, and may afterwards be acquitted on the indictment when he has an opportunity given to him of defending himself.

Sixthly; If this be admitted, the judgment will be wrong; for if the words be proved to be true, the plaintiff ought not to recover at all.

(a) See *Cuddington v. Wilkins*, Hob. 81.

Seventhly; A great hardship on the plaintiff; for he cannot give evidence of any particular damage unless he charge it particularly in his declaration, because (as has been said) the defendant cannot be prepared to answer it. And for the same reason witnesses called to the credit of witnesses cannot speak to particular facts.

1737.
SMITH
against
RICHARD-
SON

For these and several other reasons *Eight of the Judges* were of opinion not to receive such evidence. And there was a very strong case cited, determined by Lord *Macclesfield*, a great Judge and a great master of evidence. It was the case of the *Bishop of Salisbury v. Nash* (a), for saying of him "He preacheth nothing but lies in the pulpit." The defendant pleaded not-guilty; and his counsel offered to give evidence of the truth of the words in mitigation of damages, but Lord *Macclesfield* refused to admit it with a great deal of indignation.

The four Judges, who were for admitting the evidence in this particular case, gave different reasons for their opinions.

First; It was said by one that it ought to be left to the discretion of the Judge when to admit such evidence and when not; but as the consequence of this might be that some Judges would admit such evidence and some not, it was thought more for the honour of the law, and for the furtherance of justice, that there should be one uniform rule in that respect.

Secondly; It was said that a very great Judge had frequently admitted evidence if doubtful whether it was evidence or not, and said he would afterwards tell the jury how far they ought to have regard to it: but this, though the practice of a very great man, was thought to be of very dangerous consequence.

Thirdly; The cases of giving infancy, coverture, and title in evidence on the general issue, which were mentioned as cases parallel to this, are very different from this; because when they are admitted to be given in evidence, it is always in bar and not in mitigation of damages.

(a) *Bull. N. P.* 9.

Fourthly;

1737.

SMITH
against
RICHARD-
SON.

Fourthly; It was said that there is a difference between a plaintiff and witnesses, because witnesses come in by compulsion and the plaintiff is a volunteer. But this seems to be a distinction without a difference; for it is hard and unjust that a man, who pursues a legal method and craves the protection of the law for satisfaction for a wrong done to him, should be put under any disadvantages whatever. And yet if this rule were to be admitted, on the speaking of words of another which import felony or treason, the person of whom the words are spoken would be mad if he ventured to bring his action.

Fifthly; It was said that words are always laid to be spoken false et malitiose, and that therefore any evidence proving them not to be so ought to be admitted. It was agreed that malice is the gist of this action, and that therefore evidence proving the manner and occasion of speaking the words to shew that they were not spoken with malice has always been admitted; and the Judge very rightly admitted it in the present case. But if the truth of the words should be allowed to be given in evidence for this reason, it ought to be in bar of the action, which has never been pretended.

Several cases likewise were cited in favor of this opinion. The case of *Smithies v. Harrison* (a), tried before Lord Chief Justice Holt, 13 Will.; another case tried before Lord Chief Justice Holt, Hil. 7 Will.; and the case of *George v. Harding*, Hil. 12 Geo. 1. where Lord Chief Justice Raymond gave the defendant liberty to give in evidence, on not-guilty, the truth of words.

In the first case before Lord Chief Justice Holt, it was a conviction that was given in evidence which is a record; and a record is always allowed to be given in evidence even to the credit of a witness. Besides that conviction could not have been pleaded, because he was convicted only as accessory; and the words were that he was *a clipper and a coiner*. And it is admitted that what cannot be pleaded may be given in evidence in mitigation of damages.

(a) *Ld. Raym.* 727.

The next case is not a case of felony, so does not come up to this. Besides, though the opinion of a very great man, it was a *nisi prius* opinion and seemed a little extraordinary.

1737.
SMITH
against
RICHARD-
SON.

The opinion of Lord *Raymond* was likewise in a case which did not import felony.

The present case being only a case of felony, it was not necessary to determine what might be given in evidence in other (a) cases, only in the case of treason, that being still a higher crime, and so the reason stronger, and therefore the rule is extended to that.

As therefore a great majority of the Judges are of opinion that my Brother Baron *Fortescue* has done right in rejecting this evidence, the verdict that has been given must stand."

"Note: The eight Judges, who were for not admitting this evidence, were myself, J. *Page*, J. *Denton*, B. *Carter*, J. *Fortescue*, B. *Thompson*, B. *Fortescue*, and J. *Chapple*.

The four, who were for admitting it, were Ld. Ch. Just. *Lee*, Ld. Ch. Baron *Reynolds*, J. *Probyn*, and J. *Comyns*."

(a) The rule now extends to all cases whether the words do or do not import a charge of felony; See *Underwood v. Parks*, 2 *Stra.* 1209. and the cases there referred to in the notes in the octavo edition.

CATH. COSSENS, Administratrix of THOMAS
HOWARD, against B. COSSENS.

M. 11 G. 2.
Tuesday,
Nov. 22d.

[M. 11 Geo. 2. Rol. 642.]

"DEBT on bond. The defendant prays oyer of the condition, which is that, in case a marriage between the defendant and *Joan Maynard* take effect, if the said B. *Cossens*

Debt on bond
given by the
defendant on
his marriage,
with condi-
tion that he
would per-

mit his intended wife either during the marriage or by will to dispose of 50l. out of his personal estate: Plea, that defendant had not prevented his wife disposing of that sum: Replication, setting forth a particular disposition of the money by the wife, and a request on defendant to pay, and a refusal by him: Rejoinder, that defendant had not any personal estate out of which he could pay the 50l.—Held on demurrer that the rejoinder was ill;

1st, Because it was a departure from the plea; 2dly, because it would have been no defence if pleaded at first.

H

do

1737.

COSSENS
against
COSSENS.

do and shall permit and suffer the said *Joan* his intended wife at her own free will and pleasure at any time within such intermarriage, or by her last will in writing attested by two credible witnesses, at her own proper election, to dispose and give the full sum of 50*l.* out of the personal estate of the said *B. Cossens*, at such time or times and to such person or persons as the said *Joan* shall think fit to order and direct the payment of such sum, without any manner of contradiction or denial, then the obligation to be void; and pleads, admitting the marriage, that from the time of the solemnization thereof he the said *B. Cossens* hath not contradicted or denied the said *Joan* his wife at her own free will and pleasure at any time either within her intermarriage or by her last will in writing attested by two credible witnesses at her own proper election to dispose and give the full sum of 50*l.* out of the personal estate of the said *B. Cossens* at such time or times and to such person or persons as the said *Joan* shall think fit to order and direct the payment of such sum.

The plaintiff in his replication sets forth a particular appointment by *Joan* the wife according to the condition of the bond, and that the defendant had notice of the appointment, and was requested to pay the 50*l.* out of his personal estate, but that he neglected and refused to pay the same.

The defendant rejoins, and admits the disposition, but says that at the time of the making of such disposition and gift of the said 50*l.* by the said *Joan* or at any time afterwards after the time of suing forth the original writ he hath not had any personal estate whereby or wherewith to pay the said 50*l.* or any part thereof.

A general demurrer (a).

Et per Curiam (Myself, J. Denton, and J. Comyns, absent J. Fortescue Aland). The rejoinder is not good; not only because it is a departure in pleading, but also because what the

(a) This case was argued by *Belfield* Serjt. for the plaintiff, and *Draper* Serjt. for the defendant.

defendant

defendant insists on in his rejoinder would not have been good, if he had insisted on it at first in his plea; for he is estopped (a) by the condition of his bond to say that he had not sufficient personal estate.

1737.
COSSENS
against
COSSENS.

So judgment for the plaintiff."

(a) Vid. *Shelley v. Wright*, sup. page 9.

NATHAN HICKMAN and ELIZABETH EMMETT,
Executors of NATHAN HICKMAN, against CHAR-
LOTTE WALKER.

M. 11 G. 2.
Saturday,
Nov. 26th.

[M. 11 GEO. 2. Rol. 536.]

THE opinion of the Court was delivered, as follows, by

Willes, Lord Chief Justice. "Action on the case on several promises, all laid to be made to the testator in his lifetime, with a profert of the letters testamentary.

The defendant pleads non-assumpsit generally; and also that he did not promise within six years before the obtaining of the original writ of the plaintiffs in manner and form as the plaintiffs complain against him.

The plaintiffs reply that the original writ was sued out on the 20th of *May* last, and that within six years before the day of obtaining thereof, that is to say, on the 1st of *October* 1731, the letters testamentary aforesaid were duly granted &c; by which the said action of the plaintiffs accrued to them within six years.

The defendant demurs, and assigns for cause, that the plaintiffs have not directly and positively alleged that the cause of action in the declaration mentioned accrued within six years before the suing forth of the original writ, so that no issue can be joined thereon; and for that the replication is uncertain &c. (a)

(a) It appears that this case was argued | Serjt. for the defendant, and *Skinner*
on the preceding *Tuesday* by *Parker King's* | King's Serjt. for the plaintiff.

Where the statute of Limitations is pleaded to an action brought by an executor on a promise made to his testator, the six years are computed from the time when the cause of action arose, and not from the time of obtaining the probate of the will. — If defendant plead the statute of Limitations to an action brought by an executor on a promise made to the testator, and the plaintiff reply a subsequent promise to himself, it is a departure in pleading, and therefore bad.

We

1773.

HICKMAN
against
WALKER.

We are of opinion that the replication is not good, for the time of limitations must be computed from the time when the action first accrued (a) to the testator, and not from the time of proving the will. The proving of the will gave no new cause of action, and therefore the time of proving the will is perfectly immaterial.

If it were otherwise, it would make strange confusion; for then if a person died a month, or a week, or a day, before the six years expired, the executor or administrator must have six more years; and the same rule would hold in case they died before the six years elapsed, the second executor or the administrator de bonis non must have another six years. And by the same rule the assignee of a commission of bankrupt must have a new six years, though the contrary was expressly determined in the case of *Ashbrooke v. Manby* in B. R. 3 & 4 Jac. 2. reported in *Comb.* 70 (b). Though *Comberbach* was cited as an authority for the plaintiffs, I can find no case there that is so: only in the case before mentioned it was said by *Holt* that the plaintiff being an assignee of a commission of bankrupt should have a new six years from the time of the assignment: but this was before *Holt* was a Judge; and what he said there was only as counsel, and the whole Court were of another opinion. And this notion seems the more absurd, because it is directly contrary to the rule concerning the limitation of actions brought for real estates founded on the same statute (c), where it is held that if the time once begin to run, it shall run even against infants and femes coverts.

(a) The words of the statute 21 Jac. 1. c. 16. s. 3. are that actions upon the case shall be commenced and sued "within six years next after the cause of such actions or suits, and not after."

(b) The same point was also ruled in the case of *The South-Sea Company v. Wymondsell*, 3 P. Wms. 143; and also in *Gray v. Mendez*, 1 Str. 555, according to a manuscript note of which it appears that a case, supposed to have received a contrary determination in 1653 and men-

tioned in 2 Lev. 166., was cited by Mr. *Wearg* the plaintiff's counsel and overruled.

(c) The same construction has also been put upon the statute 4 Hen. 7. c. 24. respecting the time within which an entry must be made to avoid a fine. *Stowel v. Lord Zouch Saintmaure and Cantelupe*, Plowd. 355; *Doe d. Duroure v. Jones*, 4 Durnf. & East 300; and *Doe d. Griggs v. Shane*, M. 28 Geo. 3. B. R. 4 Durnf. & East 306. note b.

The cases of *Letbridge* and *Richards v. Chapman* (a) determined here and in *B. R.*, of *Wilcocks v. Huggins* (b) determined in *B. R.*, and that of *Kinfey v. Hayward*, 1 *Lutw.* 256., cited for the plaintiffs, go quite on another principle; for in all those cases an action was commenced by the testator or intestate within the six years, and pursued (c) in a reasonable time by the executor or administrator; and therefore those were adjudged (as it was said) upon the equity of that clause in the statute 21 *Jac.* 1. c. 16. which gives a year after judgments or outlawries reversed; and it is not pretended in any of them that the executor or administrator shall have a new six years.

1737.
HICKMAN
against
WALKER.

The case of *Booth v. Johnson* was cited out of *Farresley* (d) and *Lilly* (e): but *Lilly* is a book of no great authority; and as it is reported in the other, it is said that the plaintiff had judgment in this court, and that it was afterwards affirmed in the Court of King's Bench because the defendant had pleaded the statute of Limitations ill. And if so, the plaintiff's replication could never come in question.

We are therefore of opinion that the plaintiff's replication is not good for this reason (f).

But there is another reason also not mentioned by the counsel, because all the promises in the declaration are laid to be made to the testator; and where they are so, it is held in the case of *Green v. Cooke*, *M.* 3 *Ann. B. R.*, and reported by the name of *Dean v. Crane*, *Salk.* 28. and 6 *Mod.* 309., that an executor cannot give evidence of a promise to himself (g)

(a) Cited in 15 *Vin. Abr.* 103.

(b) 2 *Str.* 907; *Fitzg.* 170, 289; 1 *Barnard.* 335, 349, 382; & 2 *Barnard.* 5.

(c) See *Karver v. James*, *post. Trin.* 1741, and the cases there cited.

(d) 7 *Mod.* 143.

(e) *Lilly* 471. *S. C.* in 2 *Ld. Raym.* 838. by the name of *Gould v. Johnson*.

(f) This case is distinguishable from that of *Curry v. Stevenson*, *Carth.* 335, *Salk.* 421, and *Skin.* 555. where it was said that the administrator shall have six years from the time of granting the administration, because there the statute of Limitations had not begun to run in the

intestate's lifetime, the money not having been received by the defendant until after the death of the intestate; (though this circumstance is not noticed in the abridgment of the case in 1 *Com. Dig.* 168, or in the former edition of *Bac. Abr.* vol. 4. 479;) and also from *Stanford's* case, *Cro. Jac.* 61, and 5 *Rep.* 124. b. for a similar reason.—The first point decided in the principal case (*Hickman v. Walker*) seems also to have been determined the same way in *Smith Executor of Cod v. Hill Executor of Clark*, 1 *Wils.* 134.

(g) See *The Executors of the Duke of Marlborough v. Widmore*, 2 *Str.* 890.

1737.
HICKMAN
against
WALKER.

within six years; and if he cannot, setting forth a promise to himself in his replication as the executors have done in the present case is a departure in pleading; and for that reason also the replication is not good.

We are therefore of opinion that judgment must be for the defendant."

M. 11 G. 2. MOSES MORAVIA *against* ROBERT SLOPER Jun.
Monday, WILLIAM SALMON, JAMES WILLIAMS, and JAMES
Nov. 28th. PARKER (a).

[M. 10 GEO. 2. Rol. 1373.]

When the party (the plaintiff below) pleads a justification under process of an inferior court, he must shew that the cause of action arose within the jurisdiction of that court: but the officers of the court need not. — Whether it be not necessary to state in such a plea the nature and extent of the jurisdiction of the court below? Qu. — A capias cannot be issued out of an inferior court without a precedent summons to warrant it: but if it be pleaded that at one court the plaintiff below levied his plaint and such proceedings were thereupon had that at a subsequent court a capias issued, it will be intended that a summons issued first; but such intendment will not be made where the capias issued at the same court.

— A principal officer, to whom returnable process is directed, must shew that it is returned, but a subordinate officer need not.

THE opinion of the Court was delivered, as follows, by

Willes, Lord Chief Justice. "The action is for an assault, battery, wounding, and false imprisonment.

The defendants join in their plea, and plead the general issue not-guilty as to all the trespasss, except the assaulting, imprisoning, and keeping and detaining the said *Moses* in prison for the space of twenty-eight days. And as to that they justify in this manner;

They say that the borough of *Devizes* is an ancient borough; and that before the time &c to wit on *Friday* the 9th of *May* 1735 at a Court of Record of our lord the now King in and for the said borough in the Guildhall of the same borough and within the jurisdiction of the said court before the mayor recorder and three of the capital burgessees (naming them) being counsellors of the said borough according to the liberties and privileges of the same then held by virtue of letters patent of

(a) This case is shortly but inaccurately reported in *Com. Rep.* 574.

Car. 1. late King of *England*, 5th of *June* in the 15th year of his reign, granted to the mayor and burgeses and their successors, one *James Batten* in his proper person came and then and there levied his plaint against the said *Moses Moravia* of a plea of trespass on the case, to the damage of the said *James Batten* 40*l.*, and found pledges to prosecute his said plaint, and prayed that due process of law might be awarded against the said *Moses*, which was then and there granted him; and *thereupon such further proceedings were had* in the said court according to the tenor of the said letters patent that afterwards to wit at *that same Court of Record &c* held the same *Friday* the said 9th of *May* 1735 before the said mayor &c by virtue of the said letters patent there issued out of the said court a certain precept of our said lord the now King directed to the then bailiffs and serjeants at mace of the said borough and every of them being then and always afterwards until and after the return of the said precept ministers of the said court, by which said precept the King commanded them and every of them that they should take the said *Moses Moravia* and him safely keep so that they might have his body before the mayor &c at their next court of the same borough to be holden in the Guildhall there on *Friday* the 6th day of *June* then next to answer to the said *James Batten* of a plea of trespass on the case, to his damage 40*l.* &c; which said precept was duly indorsed on affidavit duly made for the sum of 40*l.* according to the form of the statute &c; and the said precept so indorsed was afterwards and before the time when &c *viz.* on the said 9th of *May* 1735 at the borough aforesaid by the said *William Salmon*, then and there and until the return of the said precept attorney for the said *James Batten* retained by him to prosecute the said suit and at the request of the said *James Batten*, delivered (a) to the said *James Williams* and *James Parker* then and from thence until the return of the said precept bailiffs and serjeants of the mace of the said borough and ministers of the said court to be by them executed in due form of law, and the said *James Williams* and *James Parker* were then and there requested as well by the said *William Salmon* as by the said *James Batten* and *Robert Sloper* the

1737.
 MORAVIA
 against
 SLOPER
 and others.

(a) Vid. *Rowe v. Tutte*, ante 15; | be executed is an admission of the trespass
 where it was holden, on demurrer, that the | in order to justify it.
 delivery of process by one to another to |

1737.
 MORAVIA
 against
 SLOPER
 and others.

younger to execute the same; by virtue whereof the said *James Williams* and *James Parker* at the request of the said *James Batten* and also of the said *William Salmon* his attorney and of the said *Robert Sloper* the younger afterwards and before the return thereof viz. on the said 9th of *May* 1735 at the borough aforesaid within the jurisdiction of the said court took and arrested the said *Moses* by his body and kept and detained him in their custody there for the space of twenty-eight days, as it was lawful for them to do; and the said *James Williams* and *James Parker* at the return of the said precept viz. at the said court held at the said Guildhall within the said borough by virtue of the said letters patent before the said mayor and three of the capital burgessees (naming them) being counsellors of the said borough on the said 6th of *June* then next returned the said precept duly served and executed, which is the same affaulding, imprisoning &c; wherefore they pray judgment &c.

To this plea the plaintiff demurred generally; and the defendants joined in demurrer.

It was said for the plaintiff that this being a joint plea of all the defendants, if it be not a good justification as to any one of them, it will be a bad plea as to all; and this was admitted by the counsel for the defendants, and cannot be disputed now, it having been so often determined. Vid. *Smith v. Bouchier*, M. 8 Geo. 2. B. R. (a)

Several objections (b) were taken to the plea;

First;

(a) This case has been since reported in 2 Str. 993. See also *Middleton v. Price*, 2 Str. 1184. and *Morse v. James*, post. Mich. 1738.

(b) This case was argued on the 21st of June and 12th of November 1737 by *Draper* and *Agar* Serjts. for the plaintiff, and by *Eyre* and *Parker* King's Serjts. for the defendants. On behalf of the plaintiff were cited, in support of the first and second objections, the case of *The Marshalsea*, 10 Co. 69.; *Higginson v. Martin*, 2 Mod. 195; *Martin v. Marshall*, Hob. 63; *Turner v. Folgate*, 1 Lev. 95; *Adney v. Vernon*, 3 Lev. 243; *Cotes v. Mitchell*, 3 Lev. 20; *Britton v. Cole*,

Carth. 443; *Peacock v. Bell*, 1 Saund. 73; *Strode v. Deering*, 2 Show. 168; *Johns v. Smith*, Cro. Jac. 314.; *Dennis v. Rowls*, 2 Lutw. 913; *Hargrave v. Ward*, ib. 1452; *Pinnager v. Gale*, 2 Ventr. 100, 2d resolution; *Olliet v. Befsey*, Sir T. Jon. 214; *Moufe v. —*, Yelv. 46; *Bailey v. Orme*, P. 8 Geo. 1. B. R. and *Barrow v. Durchett*, Tr. 8 Geo. 2. B. C.;—in support of the third objection, 2 Rol. Abr. 277. D. 1; *Hall v. Booth*, 1 Mod. 236; *Rogers v. Maschal*, Sir T. Raym. 128; *Read v. Wilmott*, 1 Vent. 220; 2 Lutw. 918; and *Garret v. Higby*, Sir T. Jon. 129.;—in support of the 4th objection, Co. Entr. 303, *Johns v. Smith*,

First; that it does not set forth that the cause of action arose within the jurisdiction of the inferior court, which is necessary to be done in respect to *William Salmon* the attorney and *Robert Sloper* a stranger, though perhaps it may not be necessary in respect to the two other defendants who justify as officers of the borough.

1737.
MORAVIA
against
SLOPER.

Secondly; That it is not set forth what jurisdiction this court hath; and it does not appear that this court hath any jurisdiction as to personal actions; and that in this respect it is bad as to the officers as well as to the other defendants.

Thirdly; That a *capias* cannot issue without a precedent summons, and that it does not appear that there was any precedent summons in this case; nay, that it is plain that there was not.

Fourthly; That the return is ill, it not being said that the return was made at a court held before the recorder, but only before the mayor and three capital burgesses; and that it is necessary in cases of this sort that the return should be set forth.

Before I take notice of the three first objections, I will lay the last out of the way, as being, we think, of no weight. For though we admit that the return ought to be set forth (a), being in the case of the attorney and a stranger, we think it is sufficiently set forth, it not appearing to us that the recorder's presence is necessary to the holding of a court. Vid. *Ricketts*

Smith, Cro. Jac. 314. 2d exception; and *Cooper v. Derby*, 1721, B. R.

The defendants, in answer to the two first objections, relied on the cases of *Gwinne v. Poole*, 2 *Lutw.* 935, and 1560; *Patrick v. Johnson*, *ib.* 926; *Lucking v. Denning*, *Salk.* 201; and *Thomf. Entr.* 302;—in answer to the third, *Lane v. Robinson*, 2 *Mod.* 102; and 2 *Lutw.* 1565;—and they answered the last objection by stating the fact that the return was sufficient.

(a) A principal officer, who justifies under returnable process, must shew that the writ was returned; *Middleton v. Price*, 2 *Str.* 1184, and 1 *Wils.* 17.; but a subordinate officer need not; *Salk.* 409, 410; 1 *Ld. Raym.* 634; and *Morse v. James*, *post. M.* 1738, 2d objection. But this rule is confined to writs on *mesne* process, and does not extend to writs of execution. *Hoe's case*, 5 *Rep.* 90; *Doiley v. Joilliffe*, *Lane* 52; and *Rowland v. Veale*, *Corp.* 20.

K

v. *Bowler*,

1737.
 MORAVIA
 against
 SLOPER.

v. *Bowler*, in *B. R. 3 W. & M.*; *Britton v. Cole*, *Salk.* 409;
Freeman v. Blewitt, *ib.*; and *Girling's case*, *Cro. Car.* 447.

As to the first objection; We think it a fatal objection; for though in the case of an officer, who is obliged to obey the process of the court and is punishable if he do not, it may not be necessary to set forth that the cause of action arose within the jurisdiction of the court, it has been always holden, except in one case which I shall mention by and by, and we are all clearly of opinion, that it is necessary in the case of a plaintiff himself; and if it be necessary in the case of a plaintiff, it seems to be much more so in the case of the attorney, who may be supposed to know the nature of the court and it's jurisdiction much better than the plaintiff. And we think it is stronger in the case of *Sloper*, who appears to be a mere stranger; for if a man will thrust himself into an office in which he hath nothing to do either in point of interest or of duty, as an attorney or officer, he must take care to be sure that he is in the right, otherwise it is at his peril.

This distinction between the plaintiff and the officer is expressly warranted by *Turner v. Felgate*, 1 *Lev.* 95. *Cotes v. Michill and others*, 3 *Lev.* 20; *Adney v. Vernon*, 3 *Lev.* 243; *Hodson v. Cooke*, 1 *Ventr.* 369; *Britton v. Cole*, *Carth.* 441; *Higginson v. Martin*, 2 *Mod.* 195; and *Barrow v. Durchett*, adjudged in this court *Tr. 8 Geo. 2.* And there seems to be a plain reason for this. For the inferior officer is punishable as a minister of the court if he do not obey it's commands; and it would be unjust that a man should be punished if he does not do a thing and should be liable to an action if he does. But it is otherwise in the case of a plaintiff: for (as it is said in the case of *Higginson v. Martin*) a plaintiff may sue if he please in the courts of *Westminster-hall* and then he will be safe, but if he will sue in an inferior court he is bound at his peril to take notice of the bounds and limits of it's jurisdiction. And though the Judges in that case differed as to another matter, (the process in that case being a *capias ad satisfaciendum* after judgment, and the plaintiff in the inferior court having set forth in his declaration that the cause of action arose within the jurisdiction of the court which the defendant there admitted by his plea, and

for this reason two (a) of the Judges were of opinion that the objection was cured,) yet they were all of opinion that if the case had been as the present case is the plea would not have been good. And for the reasons that I mentioned before, the case of an attorney and the case of a stranger are much stronger than that of a plaintiff.

1737.
MORAVIA
against
SLOPER.

The only case that I can find where a contrary opinion is held is the case of *Gwinne v. Poole, Jones, and Minors*, 2 *Lutw.* 935, and 1560. in *Scacc.* 4 *W. & M.*, which was cited in this case by the counsel for the defendants, and much relied upon as an authority for them: but as it is a single case, contrary to many former and some subsequent resolutions, we think that it is not sufficient to alter the law in this respect, especially since Mr. B. *Powell's* argument, (though he was a very learned Judge,) which is reported at large in *Lutwyche*, seems to me to be founded on very unsatisfactory reasons (b).

His principal reasons are,

1st, That an action of trespass will not lie against the plaintiff in such case, because he may not know where his cause of action arose, and because he may not know the extent of the jurisdiction of the inferior court. But this has been answered by what I have said already and what I cited out of the case of *Higginson v. Martin*.

2dly, Because (he says) there is no case where the person doing the thing is excused, and yet the person who only procures it to be done though absent shall be a trespasser. This rule is certainly a true one where the person commanding the thing and the person doing it are under the same circumstances. But here the officer and the plaintiff are under very different circumstances, as I have already shewn, and therefore the rule does not hold. Supposing I should order a lunatic to kill a man, he would be excused as a lunatic, and yet I should certainly be hanged; which shews the absurdity of laying down this as a general rule.

(a) But according to the report in *Freem.* 322. one of those Judges (*Atkins J.*) afterwards, and after the Court had taken time to consider of the point, agreed with *North Ch. J.* and *Windham J.* that the objection was not cured by the defendant's hav-

ing pleaded below. See also *Bull. N. P.* 83.

(b) In *Goslin v. Wilcock*, 2 *Wils.* 305. *Ld. Camden* said "Baron *Powell* in his argument of *Gwinne v. Poole* has stated the learning of cases of this kind, but has not laid down any precise rule of law."

3dly,

1737.
 MORAVIA
 against
 SLOPER.

3dly, Another argument which he makes use of is, that an action will not lie by an attorney of a court in *Westminster-hall* against a person who sues him in another court, if he does not insist on his privilege. But this differs both from the present case and the case in *Lutwyche* in two very material circumstances; 1st, that the process in both, under which the defendants justify, is not a *capias ad satisfaciendum*, but a *capias ad respondendum*, before any plea put in by which the defendant in the inferior court hath submitted to it's jurisdiction; 2dly, and in the case of an attorney, it is only a personal privilege, which if he will not insist on he is liable to the jurisdiction of another court as well as any other person.

There is but one reason that seems to be material, which is not mentioned by *Powell B.*, but is mentioned by *Lutwyche* in his report and appears to be so in the form of the proceedings, that the plaintiff there in the inferior court was an administrator, and so could not be supposed to know where the cause of action arose; and it is well known that for this reason executors and administrators are favoured by law, in being excused from costs and in several other respects: but this circumstance does not occur in the present case.

For these reasons, notwithstanding this case, we are of opinion that this is a fatal objection to the plea (a).

Secondly;

(a) It does not appear that the case of *Truscott v. Carpenter and Man*, T. 9 W. 3. since reported in 1 *Ld. Raym.* 229. was cited in the principal case: there to trespass for an assault battery wounding and false imprisonment, the defendants justified under mesne process out of the court of *Launceston* in *Cornwall* (not saying what court) on a plaint entered by *Carpenter* for a debt due to him within the jurisdiction of the court; the plaintiff replied that the cause of action arose at *St. Neot's*, absque hoc that it arose within the jurisdiction of the court of *Launceston*; and to this replication the defendants demurred.

The Court, after saying that neither the officer or party was bound to take

notice whether the cause of action arose out of the jurisdiction of the court, added "If the cause of action arose out of the jurisdiction of the court the defendant in the inferior court ought to plead it; and if he do not, the affair of the jurisdiction is over, and he shall not take advantage of it in any collateral action against the plaintiff or the officer who executes the process. And so it was resolved in the case of *Gwinne v. Poole*."

Judgment however was given for the plaintiff on account of the insufficiency of the plea.

But the opinion of the Court respecting the jurisdiction seems to be shaken not only by the case of *Moravia v. Sloper*, but also by that of *Herbert v. Cook*, E.

Secondly; But there is another, which, if possible, is still stronger, that the defendants have not set forth what jurisdiction (a) the Court of Devises hath, or whether it hath any jurisdiction at all in the case of personal actions; so that for ought that appears in the plea, it may be only a court-leet. And it is consistent even with the case in *Lutwyche* to allow of this objection. For in that as well as all the cases that I can find where these sort of pleas have been holden to be good, they have expressly set forth what jurisdiction the court had, to shew that the court had a general jurisdiction of such sort of actions. For otherwise, it has always been holden that even an officer cannot justify; as in the case of a justice of the peace, if he make a warrant to a constable to bring a man before him for a matter of which he hath a general cognizance, though he had no foundation in point of fact for granting such a warrant, or though the warrant itself be defective in point of form, yet a

1737.
MORAVIA
against
SLOPER.

22 G. 3. B. R. at least as to cases arising in inferior courts *not of record*.

That was an action of debt on a judgment in the hundred court of *St. Briavell's* in *Gloucestershire*; the declaration stating that the plaintiff levied his plaint in the court below for a cause of action arising within the jurisdiction of that court, and that such proceedings were thereupon had &c that the plaintiff recovered &c.

The defendant pleaded, besides the general issue, that the cause of action arose at *Ross* in *Herefordshire* out of the jurisdiction of that court, and not within &c.

To this last plea the plaintiff demurred, and contended in argument that, after judgment below, it was too late for the defendant to plead that the cause of action did not arise within the jurisdiction of the court below, and that if he had meant to take advantage of that he should have pleaded it in abatement below.

But *the Court*, after taking time to consider of the case, gave judgment for the defendant.

Lord *Mansfield* Ch. J. said, we find on looking into the record that there is no question at all, nor any room for argument. The counsel have gone into a wide field of argument not applicable, how far an officer is justified acting under the judgment of an inferior court not having jurisdiction, and how far the party is precluded after judgment from alleging that the cause of action arose without the jurisdiction. This is an action of debt on a judgment in the hundred court of *St. Briavell's* for a cause of action arising within the jurisdiction of the court. This the plaintiff takes upon him to aver, and he must have proved it under the general issue. The defendant pleads, 1st, nil debet, 2dly, that the cause of action arose out of the jurisdiction; to this second plea there is a demurrer which admits the fact, so that it appears on the record that there was no cause of action within the jurisdiction. Besides it is not a judgment of a court of record (1); but like a foreign judgment (2), and not conclusive evidence of the debt.

(a) Vide *Marpole v. Basnett*, note *inf.*

(1) It did not appear in this case to be a court of record; but in *Dennis v. Rowls*, 2 *Lutw.* 914. it was pleaded as a court of record.

(2) See *Walker v. Witter*, *Dougl.* 1. and the cases there referred to.

1737.
 MORAVIA
 against
 SLOPER.

constable may justify under it: but if he make a warrant to take up a man to answer in a plea of debt, a constable cannot justify under such a warrant, because the justice hath no jurisdiction of debts.

We think therefore for this reason that this plea is bad even as to the officers themselves.

Thirdly; the other objection likewise seems to be of weight (a), that here is a *capias* in the first instance, which was holden not to

(a) This objection was holden to be decisive in the cases of *Marpole v. Bassett* and *Piggott*, determined in Tr. 1747, B. C. and in *Murphy v. Fitzgerald* and another, in Tr. 26 Geo. 2. B. C.

The former was an action of assault battery and false imprisonment; to which both the defendants pleaded not guilty as to all the trespasses &c, except the assaulting beating and imprisoning the plaintiff &c; and as to that they pleaded a justification that at the Court of Record of our lord the King held in the *Guildhall* of the town of *Oswestry* on the 3d of *October* 1746 by virtue of certain letters patent granted by King *Car. 2.* on the 13th of *January* in the 25th year of his reign, *Bassett* levied a plaint against the plaintiff (*Marpole*) in a plea of trespass upon the case, to the damage of *Bassett* 20*l.* for a cause of action arising within the jurisdiction of that court, and thereupon such proceedings were had in the same court that afterwards, to wit, at and in and by the same court there issued a certain precept &c against *Marpole*, directed to the Serjeants at *Mace*, by virtue whereof *Piggott*, the other defendant, one of the Serjeants &c on &c before the return of the said precept gently laid his hands on *Marpole* in order to arrest him &c, and then and there arrested and detained him &c.

The plaintiff demurred generally; and *Belfield* Serjt. on the 13th of *May* 1747

took two objections to the plea,

1st, That it did not set forth the nature of the court, or the extent of its jurisdiction;

2dly, That a *capias* issued in the first instance; and he relied on the case of *Moravia v. Sloper*.

The answer given by *Draper* Serjt. to the first objection was that it was stated in the plea that it was a court of record of our lord the King held in and for the town &c, and that it was expressly alleged that the cause of action arose within the jurisdiction of that court; to the second, that it was stated in the plea that "thereupon such proceedings were had &c"; that it did not appear that a summons had not issued; that a summons might be returnable on the same day; and that a summons and *capias* might issue on the same day.

But *The Court* ruled that the plea could not be supported, and gave judgment for the plaintiff on the 1st of *June* 1747. M. S. *Ld. Ch. J. Willes* (1).

The other case of *Murphy v. Fitzgerald* and *Surby* was also an action of assault battery wounding and false imprisonment; in that also both the defendants pleaded a joint plea of justification, in which they set forth that there had been an immemorial court of record of our lord the King, within the liberty of the Bishop of *Rochester* in *Kent*, held at the Palace of

(1) According to Mr. Just. *Abney's* account of this case, The Court "did not absolutely determine that the plea was bad because the jurisdiction was not set forth, though they were strongly inclined to think so: but on the second objection, they were clear that it was bad, for a *capias* in the first instance without a summons is illegal."

to be good in the case of *Read v. Wilmot*; 1 Vent. 220; *Hall v. Booth*, 1 Mod. 236., and in several cases in *Roll's Abridgment*, and several other books. And though *Powell B.* in the argument before mentioned differs likewise from these cases and from the opinion of my Lord Chief Justice *Hale* in this respect, and says that a *capias* in the first instance in inferior courts is only a process in verso ordine and consequently erroneous and not void, and that therefore a person may justify under it, I cannot (I own) see the reason of this assertion, or know very well how to make sense of it; for by the same reason if in a

1737.
MORAVIA
against
SLOPER.

Rochester once in every three weeks on a Friday before the steward of the court, for the trying and determining of all kinds of personal actions arising within the liberty &c; that at a court there held on Friday the 15th of December 1752 before *E. Wyatt* the steward the defendant (*Fitzgerald*) levied his plaint against *Murphy* in plea of trespass upon the case (1), to his damage of 20 l.; that thereupon such proceedings were in the same court that afterwards, to wit, at the same court on the same day there issued a certain precept &c directed to *Surby* one of the ministers of the said court &c indorsed for bail &c, by virtue whereof *Surby* on &c before the return of the said precept and within the jurisdiction of the court gently laid his hands on the plaintiff (*Murphy*) in order to arrest him, and then and there arrested him &c.

To this plea there was a general demurrer, and judgment was given for the plaintiff, without hearing any argument, on the authority of *Moravia v. Sloper*. M.S. Ld. Ch. J. *Willes*.

This objection, that a *capias* issued without a summons, was afterwards taken in the case of *Titley v. Foxall*, Tr. 1758, B. C. vide post.: but it was there overruled, it appearing on the plea that the plaint was levied at one court and the *capias* issued at a subsequent court, and this allegation being there introduced by taliter processum est &c.

These cases may be reconciled by the application of this rule, where it is sufficiently shewn in pleading that the court below had jurisdiction over the cause, every intendment (2) will be made in favor of their proceedings that can be made consistently with the facts pleaded; and therefore consistently with the facts pleaded in *Titley v. Foxall* a summons might have issued (though none was stated) at the court at which the plaint was levied, to warrant the issuing of the *capias* at the next court: but no such intendment could be made in *Moravia v. Sloper*, *Marpole v. Bassett*, and *Murphy v. Fitzgerald*, because it appeared in each of those cases that the *capias* issued out of the same court at which the plaint was levied.

And though the case of *Adams v. Freeman* and *Winns*, as reported in *Sayer* 81, and 2 *Wilson* 5., appears to break in upon the above distinction, by referring to the record in the Treasury Chamber (which is entered Tr. 24 Geo. 2. 1750, Rol. 925.) that decision will be found to be reconcileable with all the above cases, it appearing in both pleas (which were joint pleas by both the defendants, and not separate ones by each as represented in *Sayer*.) that the plaint was levied at a court holden at *Daventry* on Thursday the 1st of June, and that the *capias* did not issue until Thursday the 8th of June when the next court was holden.

(1) Not saying for a cause of action arising within the jurisdiction of the court.

(2) Vid. *Sollers v. Lawrence*, post. Tr. 16 & 17 Geo. 2.

1737.
MORAVIA
against
SLOPER.

superior court an exigent were to be taken out the first process, he might as well say that that was only in verso ordine, which yet I think would be a little absurd. This objection was indeed endeavoured to be answered, because, as it is said here taliter processum est &c, it must be presumed that a summons duly issued before, and that this sort of pleading has been allowed to be good. It is true that in some cases it has been holden to be good, and in some not. Vide 2 *Lutw.* 913. &c. But it is plain that in the present case there could be no precedent summons, because the capias is said to issue *at the same court* at which the plaint was levied; so there could be no summons returned to warrant this capias. But this objection need not be relied on, as we are of opinion that the two first are fatal objections to this plea.

Therefore judgment must be for the plaintiff (a)."

(a) Vide *Johnson v. Warner*, *post.* H. 1744, 5.

Mich. 11 G. 2.
Monday,
Nov. 28th.

JOSEPH ALEXANDER *against* JOHN MAWMAN, Executor of JOSEPH HOLDSWORTH.

A defendant cannot plead in abatement after making a full defence: but he must defend the force and injury when &c, before he can plead in abatement to the disability of the person. — A defendant, sued as executor, cannot plead in abatement that a co-executor ought to have been sued with him, without shewing that the co-executor administered &c. — Where the defendant, in pleading such a plea, said that "he and the other executor did administer divers goods &c. where the said A. B.'s (the testator's)" the Court rejected "where" as surplusage, and held the plea good.

THE following opinion of the Court was thus given by

Willes, Lord Chief Justice. "Action on the case on several promises.

The defendant in his plea comes and defends the force and injury when &c. and prays judgment of the writ, because he saith that the said *Joseph Holdsworth* made his will 15th January 1735 at *Bury St. Edmunds*, and thereby did constitute and appoint him the said *John Mawman* and one *John Fearnley* executors of the said will and afterwards died, after whose death the said *John Fearnley* together with the said *John Mawman* as executors of the said will did there administer divers goods and chattels where the said *Joseph Holdsworth's* at the time of his death, which said *John Fearnley* is still living; wherefore as the said *John Fearnley* is not named in the said writ, he

prays

prays judgment of the said writ, and that the same may be quashed.

1737.

ALEXANDER
against
MAWMAN.

The plaintiff demurs generally, and the defendant joins in demurrer.

Two objections were taken (a) to this plea;

First, that the defendant has made a full defence, *by defending the force and injury when &c.*, and so cannot afterwards plead in abatement.

Secondly, That he has not set forth that the other executor administered, which is absolutely necessary to make the plea good.

As to the first objection; we agree that if the defendant had made a full defence, he could not afterwards plead a plea in abatement. But we are of opinion that going no farther than "defending the force and injury when &c." is not a full defence; and so it is expressly said in *Litt. sect. 195.* and *Co. Lit. 127. b.* And it is there said that a defendant must first make himself party (b) by saying *defendit vim et injuriam quando &c.*, before he can plead to the disability of the person or the jurisdiction of the court: but that if he goes on and says *et damna et quicquid quod ipse defendere debet &c.*, that amounts to a full defence; and after that he cannot plead a plea in abatement (c).

This is indeed said to be otherwise determined in the case of a plea of outlawry, 1 *Lutw. 5. Garwen v. Surby*; for there the

(a) It appears that this case was argued on Friday, Nov. 11th 1737, by Prime Serjt. for the plaintiff, and Bootle Serjt. for the defendant. By the former these authorities were cited; *Bro. Abr. tit. "Defence," pl. 3. 12. 15. 21; Litt. sect. 195; 1 Inst. 127. b.; Sty. 273; 1 Lutw. 5; and Cro. Jac. 82.* And these quotations were made by the latter; *Cist's Entr. 15. pl. 37; Brownl. Rediv. 199, 200; Co. Lit. 127. b.; 9 Co. 37. b.; 1 Lev. 161; and 1 Keb. 865.*

(b) Vide *Ferrers v. Miller, Carth. 220.* cont. by three Judges against Holt Chief Justice.

(c) The same point was ruled in *Wheatley v. Cudmerston, M. 15 Geo. 2.* in the Common Pleas, and *Thompson v. Stockdale, H. 23 Geo. 3.* in the King's Bench. If the defendant plead a misnomer in abatement, he must take care not to admit himself to be the person sued. In *Roberts v. Robert Moon, 5 Durnf. and East 487.* The Court of K. B. overruled a plea in abatement of misnomer of the defendant, which began thus, "And the said Richard sued by the name of Robert &c."; because "by introducing the word said he admitted himself to be the person sued."

M

defendant

1737.
ALEXANDER
against
MAWMAN.

defendant introduced his plea of outlawry with a "defendit vim et injuriam quando &c;" and upon a demurrer a respondeas ouster was awarded. And the case in *Stiles* 273, which was cited for the plaintiff in this case, was likewise there cited as an authority for the judgment: but in that case there was no judgment given, but the matter was ordered to be spoken to again. And *Lutwyche* at the end of the case in his Reports seems to doubt it's authority; for he says that there is a multitude of precedents to the contrary in all the books of pleadings; and he cites many precedents which are all in the same manner as the present. So we think, as *Lutwyche* himself did, that that case is not law.

In support of the second objection it was said that pleas in abatement ought to be more certain than others; and that we admit. It was said likewise that it is necessary for the defendant to set forth that the other executor administered; to which we likewise agree; for the case of *Swallow v. Emberson*, which was cited out of 1 *Lev.* 161. and 1 *Keb.* 865. and several other cases are express to that purpose (a). But we are of opinion that it is sufficiently set forth in this plea that the other executor *John Fearnley* administered; for rejecting the word "where," which ought to be rejected as nonsense and surplusage, the rest is sensible and intelligible enough, that "John Fearnley did administer several goods and chattels the said *Joseph Holdsworth's* at the time of his death.

We are therefore all of opinion that judgment must be for the defendant, and that the writ must be quashed."

(a) *Rawlinson v. Shaw*, 3 *D. and E.* 560. per *Grose J.*; S. P.

1737, 8.

WILLIAM LEGG on the Demise of JONATHAN SCOT
Sen^r and Jun^r against SAMUEL and EBENEZER
BENION.

Hil. 11 G. 2.
Wednesday,
Feb. 1st.

THE opinion of the Court was thus delivered by

Willes, Lord Chief Justice. "Case made before Mr. J. *Comyns* at *Oxford* Summer Assizes 1736. It arose on a lease made between *Jonathan Scot* the elder and *John Benion* on the 1st of *October* 1730, by which *Jonathan* demised the premises in question to *John Benion* in these words "To hold the same unto the said *John Benion* his executors administrators and assigns from the feast of *Saint Michael the Archangel* next before the date thereof for and during and until the full end and term of twenty-one years from thence next ensuing and fully to be complete and ended, provided they the said *Jonathan Scot* and *John Benion* and both of them shall and do so long live; but in case either of them shall happen to depart this life before the expiration of the said term of twenty-one years, then and in such case the heirs executors administrators or assigns of such person so dying shall give twelve months' notice in writing of their quitting or surrendering up the said premises;" under the rent of 26*l.* 10*s.* a-year, payable during the said term of twenty-one years so determinable as aforesaid.

John Benion entered, and died on the 29th of *April* 1733: *Ebenexer Benion* the defendant is his administrator, and *Samuel* is his undertenant. The lessors of the plaintiff gave twelve months' notice before the demise laid in the declaration to both the defendants to quit or surrender up the premises: but they insisted to hold the same; and neither they or either of them nor the heirs or assigns of the said *John Benion* ever gave any notice to quit or surrender up the premises.

The question (a) therefore is whether the lease be or be not determined?

not determine it by giving a *parol* notice.

(a) This case was argued in the *Michaelmas* Term preceding.

And

Demise from A. to B. for twenty-one years, if both should so long live; but if either should die before the end of the said term, then the heirs executors &c of the person so dying should give twelve months' notice to quit &c.—Held that the lease could only be determined by twelve months' notice given by the representatives of the party dying before the end of the term; and consequently that such notice given by the lessor to the representatives of the lessee (who died during the term) did not determine it. —Where power is given to a party to determine a lease on giving a notice in writing, he cannot determine it by giving a *parol* notice.

1737, 8.

LEGG
dem. Scot
against
BENION.

And as the question arises merely on the words of a lease very inaccurately penned, so I know no case that can guide the Court in the construction of them, nor will the determination of the Court in this case be (I believe) ever cited as a precedent in any case whatsoever, because there will scarcely ever be any other lease penned in this manner.

The best rule therefore that the Court can follow in this case is to find out the intent of the parties, if possible. The case in *Hetley* 76. and several other cases were cited on the argument of this case to shew that the lease would have determined on the death of either the lessor or lessee by virtue of the words "provided they and both of them shall so long live," if there had been no other words: but there is no occasion to take notice of these cases, because there is no doubt on this part of the case by reason of the words "they and both of them shall so long live." But the doubt arises only on the subsequent words, in the construction of which these cases give no light. Some other cases were cited to shew that these subsequent words do not amount to a condition, but I need not mention them, because (to be sure) they do not amount to a condition, as they affect both the grantor and the grantee. But I take them to be words denoting, though a little obscurely, when the term in one instance is to determine.

The rules of construction are that no words in a deed shall be rejected if any sense can be put upon them, and that the words of a deed are to be taken most strongly against the grantor.

Now let us consider the present case according to these rules. Here is no notice given according to the lease, for the notice is not given *by* the representatives of the lessee, nor said to be in writing (a), so the notice must be laid out of the case. If there-

(a) If a lessee be restrained, by his lease, from underletting during the term without *leave in writing* from the lessor, a *parol license* to underlet does not discharge the former from the restriction. *Roe d. Gregson v. Harrison*, 2 *Durnf. & East* 430.—So where Mr. Barry had co-

venanted with Mr. Garrick to perform at *Drury-Lane* and not to absent himself without *leave in writing*, a *parol license* given by the latter was holden to be no answer to an action of covenant brought on the articles; cited in 3 *Durnf. & East* 592.

fore the lease be deemed to be determined, all the subsequent clause, after the words "if both of them shall so long live" must be rejected as superfluous: but I think that a reasonable sense may be put upon them.

1737, 8.

LEGG
dem. SCOT
against
BENION.

There are two instances put;

1. In case both of them live to the end of the term, then it is undoubtedly to continue;

2. In case one of them die; and then I think it is to continue until the representatives of the person dying give twelve months' notice.

The words are "then the heirs executors administrators or assigns of such person so dying shall give twelve months' notice in writing of their quitting &c;" which I think may be construed thus, "until the heirs executors &c of such person so dying shall give twelve months' notice &c." This seems to me to be the only reasonable sense that can be put on these words; that if the lessor die, his representatives may not turn out the lessee without due notice; and if the lessee die, that his representatives may not throw up the estate on the landlord without the like notice. This seems to me to be the intent of the parties. And this construction is supported by these words in the clause, "in case either of them die *before the expiration of the term*," which seems to suppose that the term might continue after the death of one of them: whereas if any other construction be put on the words, it must determine on the death of either of them. The word "their" at the latter end of the clause seems the only word in the clause that does not quite tally with this construction, and is not quite sense: but that (a), though not a very proper word, must be taken to mean the persons who are to quit and surrender the premises.

We are therefore of opinion that the lessors of the plaintiff have no right to recover; and that a nonsuit must be indorsed on the postea."

(a) The word "their" seems to have | there being more than one representative
been introduced to apply to the event of | of either the lessor or lessee.

1737, 8.

Friday,
Feb. 3d.JOHN DAVIES *against* THOMAS POWELL and Six
Others.Deer in an
inclosed
ground may
be distrained
for rent.S. G. Co.
146. 7 Mod.
249. oct. ed.
S. C.

THE following opinion of the Court was thus given by

Willes, Lord Chief Justice. "Trespas for breaking and entering the close of the plaintiff called *Caversham Park*, containing six hundred acres of land, in the parish of *Caversham* in the county of *Oxford*, for treading down the grass, and for chasing taking and carrying away diversas feras, videlicet, one hundred bucks one hundred does and sixty fawns of the value of 600 *l.* of the said plaintiff inclusas et coarctatas in the said close of the said plaintiff. Damage 700 *l.*

The defendants all join in the same plea; and as to the force and arms &c they plead not guilty: but as to the residue of the trespass they justify as servants of *Charles Lord Cadogan*; and set forth that the place where &c at the time when &c was and is a park inclosed and fenced with pales and rails, called and known by the name of *Caversham Park* &c; and that the said Lord *Cadogan* was seised thereof and also of a messuage &c in his demesne as of fee, and being so seised on the 3d of *August* 1730 by indenture demised the same to the plaintiff by the name (inter alia) of all the said park called *Caversham Park* from *Lady-day* then last past for the term of seven years under the rent of 124 *l.* 2s. The deer are not particularly demised, but there is a covenant that the plaintiff his executors and administrators should from time to time during the term keep the full number of one hundred living deer in and upon the said demised premises or in or upon some parts thereof. And Lord *Cadogan* covenants to allow the plaintiff in the winter yearly during the term twenty loads of boughs and lops of trees for browse for his deer to feed on, calling them there, as he does in other parts of the lease, "the deer of the said *John Davies*;" and likewise covenants that if the plaintiff shall on the feast of *St. Michael* next before the expiration thereof pay Lord *Cadogan* all the rent that would be due at the expiration of the lease, then the

plaintiff his executors &c might sell and dispose of any or all of the deer that he or they should have in the said park at any time in the last year of the said term, any thing in the said indenture to the contrary thereof in any wise notwithstanding. And the defendants justify taking the said deer as a distress for 186*l.* rent due at *St. Thomas-day* 1731; and say that they did seize chase and drive away the said deer in the declaration mentioned then and there found, "being the property of and belonging to the said *John Davies*" in the name of a distress for the said rent; and then set forth that they complied with the several requisites directed by the act concerning distresses, (and to which there is no objection taken;) that the deer were appraised at 161*l.* 15*s.* 6*d.*, and that they were afterwards sold for 86*l.* 19*s.* being the best price they could get for the same; and that the said sum was paid to Lord *Cadogan* towards satisfaction of the rent in arrear; and that in taking such distress they did as little damage as they could.

1737, 8.

DAVIES
against
POWELL.

To this plea the plaintiff demurs generally, and the defendants join in demurrer.

And the single question that was submitted to the judgment of the Court, is whether these deer under these circumstances, as they are set forth in the pleadings, were distrainable or not. It was insisted (a) for the plaintiff that they were not;

1st, Because they were *feræ naturæ*, and no one can have absolute property in them.

2dly, Because they are not chattels, but are to be considered as hereditaments and incident to the park.

3dly, Because, if not hereditaments, they were at least part of the thing demised.

4thly, Their last argument was drawn *ab inusitato*, because there is no instance in which deer have been adjudged to be distrainable.

First; to support the first objection, and which was principally relied on by the counsel for the plaintiff, they cited *Finch* 176; *Bro. Abr.* tit. "*Property*" pl. 20; *Keilway*, 30. b. *Co. Lit.* 47. a.

(a) This case was argued in *Michael-* tiff and *Eyre* King's Serjt. for the defend-
mas 1737 by *Wright* Serjt. for the plain- ants.

1737, 8.

DAVIES
against
POWELL.

1 *Rol. Abr.* 666, and several other old books, wherein it is laid down as a rule that deer are not distrainable; and the case of *Mallocke v. Eastly*, 3 *Lev.* 227., where it was holden that trespass will not lie for deer, unless it appears that they are tame and reclaimed. They likewise cited 3 *Inst.* 109, 110., and 1 *Hawk. P. C.* 94., to prove that it is not felony to take away deer, conies &c, unless tame and reclaimed.

I do admit that it is generally laid down as a rule in the old books that deer, conies &c, are *feræ naturæ*, and that they are not distrainable; and a man can only have a property in them *ratione loci*. And therefore in the case of swans, 7 *Co.* 15, 16, 17, 18., and in several other books there cited, it is laid down as a rule that where a man brings an action for chasing and taking away deer, hares, rabbits, &c, he shall not say *suos*, because he has them only for his game and pleasure *ratione privilegii* whilst they are in his park, warren &c. But there are writs in the register, fo. 102. a book of the greatest authority, and several other places in that book which shew that this rule is not always adhered to. The writ in fo. 102. is "*quare clausum ipsius A. fregit et intravit, & cuniculos suos cepit.*"

The reason given for this opinion in the books why they are not distrainable is that a man can have no valuable property in them. But the rule is plainly too general; for the rule in *Co. Lit.* is extended to dogs; yet it is clear now that a man may have a valuable property in a dog. Trover has been several times brought for a dog, and great damages have been recovered. Besides the nature of things is now very much altered, and the reason which is given for the rule fails. Deer were formerly kept only in forests or chases, or such parks as were parks either by grant or prescription, and were considered rather as things of pleasure than of profit: but now they are frequently kept in inclosed grounds which are not properly parks, and are kept principally for the sake of profit, and therefore must be considered as other cattle.

And that this is the case of the deer which are distrained in the present case is admitted in the pleadings. The plaintiff by bringing an action of trespass for them in some measure admits himself to have a property in them; and they are laid to be in-

clusas

clusas et coarctatas in his close, which at least gave him a property *ratione loci*; and they are laid to be taken and distrained there: but what follows makes it still stronger; for in the demise set forth in the plea, and on which the question depends, they are several times called *the deer of John Davies the plaintiff*, and he is at liberty to dispose of them as his own before the expiration of the term on the condition there mentioned. And it is expressly said that the defendants distrained the deer being the property of the said *John Davies*: it is also plain that he had a valuable property in them, they having been sold for 86*l.* 19*s.*; both which facts are admitted by the demurrer. The plaintiff therefore in this case is estopped to say either that he had no property in them or that his property was of no value. Besides it is expressly said in *Bro. Abr.* tit. "*Property*," *pl.* 44., and agreed in all the books, that if deer or any other things *feræ naturæ* become tame, a man may have a property in them. And if a man steal such deer, it is certainly felony, as is admitted in 3 *Inst.* 110. and *Hawk. P. C.* in the place before cited (a).

1737, 8.

DAVIES
against
POWELL.

Upon a supposition therefore, which I do not admit to be law now, that a man can have no property in any but tame deer, these must be taken to be tame deer, because it is admitted that the plaintiff had a property in them.

Secondly; as to their not being chattels but hereditaments and incident to the park and so not distrainable, several cases were cited; *Co. Lit.* 47. *b.* and 7 *Co.* 17. *b.*; where it is said that if the owner of a park die the deer shall go to his

(a) The Legislature have also made provisions at different times for the protection of deer in forests and open as well as inclosed grounds. But by the stat. 16 *Geo.* 3. *c.* 30. all the former acts relating to this subject (except that of the 9 *Geo.* 1. *c.* 22.) are expressly repealed by name; and it has been since holden by all the judges that that also, as far as it made it a capital offence to kill destroy or steal deer, was virtually repealed; *R. v. Davies*, 1783. The stat. 16 *Geo.* 3. *c.* 30. inflicts a penalty of 30*l.* on persons who kill wound or destroy, or take in any snare

&c or carry away any red or fallow deer in any forest chase purlieu or ancient walk, whether inclosed or not, or in any inclosed park paddock wood or other inclosed ground where deer are usually kept without the consent of the owner &c, or aid therein; and a penalty of 20*l.* on persons who course hunt shoot at or otherwise attempt to kill wound or destroy any such deer &c, or aid therein &c; and a double penalty on the keepers for either of those offences; and it subjects the offender to transportation for seven years for a second offence.

O

heir

1737, 8.

DAVIES
against
POWELL.

heir and not to his executors; and the statute of *Marlbridge*, 52 Hen. 3. c. 22., where it is said that no one shall distrain his tenants de libero tenemento suo nec de aliquibus ad liberum tenementum spectantibus. I do admit the rule that hereditaments or things annexed to the freehold (a) are not distrainable; and possibly in the case of a park, properly so called, which must be either by grant or prescription, the deer may in some measure be said to be incident to the park: but it does not appear that this is such a park, nay it must be taken not to be so. In the declaration it is styled *the close of the plaintiff*, called *Caversham Park*. In the plea indeed it is styled a *park*, called *Caversham Park*: but it is not said that it is a park either by grant or prescription; and it cannot be taken to be so on these pleadings, but must be taken to be a close where deer have been kept, and which therefore has obtained *the name of a park*, because the deer, as I mentioned before, are called *the deer of John Davies*, and because he is at liberty to sell them, and so to sever them from the park before the expiration of the term. And in *Hale's History of the Pleas of the Crown*, 1 vol. fo. 491., cited for the defendants, it is expressly said that there may be a *park in reputation*, "as if a man inclose a piece of ground and put deer in it, but that makes it not a park without a prescription time out of mind or the King's charter." Vid. stat. 21 Ed. 1. de malefactoribus in parcis there referred to.

Thirdly; as to the third objection that the deer are part of the thing demised, and consequently not distrainable; the only case which was cited to prove this was the case of tithes (b) which is nothing to the purpose; because where tithes only are let a man cannot reserve a rent, it being only a personal contract. Without denying the rule, which I believe is generally true, the

(a) "Furnaces caldrons and the like fixed to the freehold, or the doors or windows of a house and the like, cannot be distrained." Co. Lit. 47. b. Bro. Abr. "Distress," pl. 23.—Neither can a lime kiln, if affixed to the freehold, be distrained. But where the plaintiff in replevin declared for taking his goods and chattels, to wit, a lime kiln; and the defendant avowed taking it as a distress for rent in arrear; and the plaintiff in his plea in

bar said that the lime kiln was affixed to the freehold, it was holden, on demurrer, that the plea in bar was a departure from the declaration which asserted it to be a chattel; though, had it been a portable oven, it might have been distrained; and judgment was given for the defendant. *Niblett v. Smith*, 4 Durnf. & East 504.

(b) Vid. Bro. Abr. tit. "Distress," pl. 81; tit. "Dette," pl. 234; 1 Rol. Ab. 667; pl. 18; and *Finch* 135, 6.

fact here will not warrant it, for they are not part of the thing demised. They are not mentioned in the description of the particulars, and cannot be part of the thing demised for the reason before given, because they may be sold and disposed of by the plaintiff before the expiration of the demise.

1737, 8.

DAVIES
against
POWELL.

Fourthly; the last argument, drawn ab inusitato, though generally a very good one, does not hold in the present case. When the nature of things changes, the rules of law must change too. When it was holden that deer were not distrainable, it was because they were kept principally for pleasure and not for profit, and were not sold and turned into money as they are now. But now they are become as much a sort of husbandry as horses cows sheep or any other cattle. Whenever they are so and it is universally known, it would be ridiculous to say that when they are kept merely for profit they are not distrainable as other cattle, though it has been holden that they were not so when they were kept only for pleasure. The rules concerning personal estates, which were laid down when personal estates were but small in proportion to lands, are quite varied both in courts of law and equity, now that personal estates are so much increased and become so considerable a part of the property of this kingdom.

Therefore, without contradicting the reasons which are laid down concerning this matter in the ancient books, and without determining any thing with respect to deer in forests and chases or parks properly so called, concerning which we do not think it necessary to determine any thing at present, we are all of opinion that we are well warranted by the pleadings to determine that these deer, under the circumstances in which they appear to have been at the time when this distress was taken, were properly and legally distrained for the rent that was in arrear.

There must therefore be judgment for the defendants (a)."

(a) Vid. *Simpson v. Hartopp*, M. 18 Geo. 2. post.

1737. 8.

Hil. 11 G. 2.
Saturday,
Feb. 4th.JAMES COOPER *against* W. MONKE and Three Others.

[E. 10 GEO. II. Rol. 623, 4, 5.]

Replication
de injuriâ suâ
propriâ ab-
que tali
causâ is bad
where the de-
fendant insists
on a right.
—When de-
fendant (in
an action of
trespafs) jus-
tifies in his
plea taking
the goods as
a distress for
rent, the
plaintiff in
his replica-
tion must
either admit
or deny the
rent in ar-
rears; reply-
ing de inju-
riâ suâ pro-
priâ &c is im-
proper.
—Where de-
fendant jus-
tifies (in tres-
pafs for tak-
ing the plain-
tiff's goods
and convert-
ing them &c)
taking them
as a distress
for rent, the
taking and
converting
are considered
as the same
thing; and
therefore it is
not inconsis-
tent to plead a
justification
to the taking
and convert-
ing all the
goods, as a
distress, and
afterwards to
say that he
left part of
them in the
plaintiff's
possession.

THE opinion of the Court was now delivered as follows by

Willes, Lord Chief Justice. “Trespafs for breaking and entering the house of the plaintiff in the parish of *St. Margaret's Westminster*, continuing there for the space of thirteen days, disturbing him in the quiet possession of his house, and taking and carrying away from thence and converting to their own use the several goods and chattels particularly mentioned in the declaration, of the value of 100*l.* And likewise for breaking and entering the shop of the plaintiff in the said parish, and expelling him from the possession thereof, and taking and detaining divers other goods and chattels therefrom and likewise particularly specified in the declaration, of the value of 20*l.* The damages are laid at 100*l.*

The defendants all join in the same plea: And as to the force and arms &c, and all the trespasses (except entering the said house and shop and continuing in the said house for the space of thirteen days, and taking and detaining in the said shop carrying away and converting to their own use the said goods and chattels of the plaintiff in the declaration mentioned,) they plead not guilty.

And as to the entering of the said house and shop and continuing there thirteen days, and taking detaining in the said shop carrying away *and converting to their own use* the said goods and chattels, they insist on a special justification; and set forth in their plea that before the said time when &c. the Dean and Chapter of *Westminster* were seised in fee in right of their church of two tenements, of which the locus in quo &c is parcel, and being so seised on the 6th of *November* 1728 demised the same by indenture to *Martha Peers* from the *Michaelmas* before for forty years; that *Martha* entered and was possessed, and on the 7th of *December* 1728 by indenture demised to the plaintiff the house and shop mentioned in the declaration (inter alia) from the

Michaelmas

Michaelmas before for eleven years under the rent of 6*l.* 17*s.* 6*d.* 1737, 8.
 for the first three months, 55*l.* a-year afterwards for the next
 ten years, and 41*l.* 5*s.* for the last three quarters; that by vir-
 tue of the said demise the plaintiff entered and was possessed;
 and that, he continuing in possession, *Martha Peers* afterwards
 on the 20th of *October* 1729 married the defendant *W. Monke*;
 and the defendant *W. Monke* in his own right and in the right of
 the said *Martha*, and the other defendants as his servants and by
 the command of him and of the said *Martha*, justify taking the
 goods and chattels in the declaration as a distress for 82*l.* 6*s.*, the
 residue of 82*l.* 10*s.* for a year and a half rent due on the feast of
St. John the Baptist 1736, the other 4*s.* having been paid before.

COOPER
 against
 MONKE.

And they set forth their justification in this manner; that on
 the 26th day of *June* in the year last mentioned they entered
 into the house and shop &c in order to distrain for the said rent,
 and then and there took the goods and chattels in the declaration
 mentioned, they being in the said house and shop, in the name
 of a distress for the said rent, and the goods and chattels so
 distrained they then impounded in the house and shop by the
 permission and with the consent of the plaintiff to prevent any
 damage that might happen by removing the same; and that the de-
 fendants continued in the said house thirteen days by causing one
A. Garner to continue in the said house in which &c for thirteen
 days for the securing of the said goods so distrained, which said
A. Garner so continued in the said house in which &c for thir-
 teen days for the said cause by the permission with the consent
 and at the request of the plaintiff; and that the defendants after-
 wards on the 7th and 8th of *July* following did with the consent
 of the plaintiff publicly sell divers of the said goods to the best
 bidder at the best price which could be got for the same for the
 sum of 31*l.* 5*s.* 3*d.* and no more, which the defendant *Monke*
 received in part satisfaction of the rent so in arrear; and the
 rest of the said goods and chattels that remained unsold were
 at the desire and with the consent of the plaintiff left in the said
 house and shop in the possession of the plaintiff, and the same
 still remain in his possession, &c.

The plaintiff in his replication admits the lease from the Dean
 and Chapter to *Martha Peers*, and the lease from *Martha Peers*
 to the plaintiff, and that the house and shop were part of the

P

premises

1737, 8.

COOPER
against
MONKE.

premises so demised; and for replication saith that the defendants at the said times when &c of their own wrong without any such cause as is by them in their said plea above alleged did enter the said house and shop and did continue in the said house for the space of thirteen days, and the said goods and chattels found in the said house did take carry away and convert to their own use, and take and detain in the said shop the said goods and chattels found in the said shop in manner and form &c.

To this replication the defendants demur; and for causes of demurrer say, that the plaintiff by his replication hath not admitted that the rent in the plea mentioned to be in arrear was due, and for that the replication is multifarious, and several matters are offered to be put in issue, and no particular issue can be joined thereupon; and for that the replication is uncertain and wants form.

The plaintiff joins in demurrer.

Several objections were taken to this replication upon the first argument (a), and several cases were cited to support these objections.

The principal objections which were taken to the plaintiff's replication were that he had not admitted the rent in arrear, so would be at liberty to insist on an entry and eviction; and because this general replication that they did it of their own wrong without any such cause &c is never admitted when the defendants insist on a right (b), as they plainly do in the present case, but is only admitted when the defendants insist on a matter of excuse, as that the plaintiff's fences are out of repair in an action of trespass with cattle, or son assault demesne in an action of assault and battery; and to support these objections were cited 8 Co. 67. a; Yelv. 157; Cro. Jac. 224, 225; *Chance v. Weeden*, Salk. 628; and *Wells v. Cotterell*, 3 Lev. 48. And we were all clearly of opinion upon that argument that the replication was not good.

(a) This case was first argued in *Trinity* term 1737 by *Parker King's* Serjt. for the defendants and by *Bootle* Serjt. for the plaintiff; and again in the *Michaelmas* term following by *Eyre King's* Serjt. for

the former and *Wright* Serjt. for the latter.

(b) See *Cockerill v. Armstrong*, post. Tr. 1738, and the cases there referred to; and *Bell v. Wardell*, post. E. 1740.

The Court being of that opinion, the counsel for the plaintiff took some objections to the defendant's plea, which was afterwards spoken to again, and which is the only matter that now remains for the judgment of the Court.

1737, 8.

COOPER
against
MONKE.

The objections to the plea were two;

First, that the defendants pleaded a justification to the taking carrying away and converting to their own use all the goods and chattels in the declaration mentioned, and yet afterwards insist that they did not convert part of the said goods but left them in the possession of the plaintiff where they still are; so the plea is inconsistent with itself; for a man cannot admit that he has converted *all* the goods to his own use in the beginning of his plea, and afterwards insist that he has not converted *part* of them.

Secondly, that the justification does not go to all the goods. For they say that they sold divers of the goods and chattels for 31 l. 5s. 3d.; and then, instead of saying that *all the rest of the goods*, or the rest of the goods which were not sold for the said sum of 31 l. 5s. 3d., were at the desire and at the request of the said plaintiff left in the said house &c, they only say that "the rest of the said goods that remained unsold" generally; so that for ought that appears by this plea there might be some goods sold without the consent of the plaintiff besides those which were sold with his consent for the sum of 31 l. 5s. 3d.; and if there were, as to those there is no justification.

Several cases were cited to make out these objections, and several cases cited in answer: but it is not material to mention any of them, because I think that the present case depends on a general rule of law, which was admitted on both sides, and upon the particular penning of this plea.

First; as to the first objection: we are of opinion that this being an action of trespass, and not of trover, the taking away and converting are the same; for every taking is a sufficient conversion to this purpose (a). And as the defendants have in-

(a) Vid. *Dye v. Leatherdale*, 3 Wilf. | C. B. cited by Buller J. in *Taylor v. Cole*, 20; and *Fisherwood v. Cannon*, H. 5 Geo. 3. | 3 Durnf. & East 297.

1737, 8.

COOPER
against
MONKE.

list in their plea that they took all the goods as a distress, we think that that is a sufficient conversion of the whole, though they were not removed out of the house and shop where they were; for the possession in point of law is changed by their being seized as a distress, and as it is said that they were all *impounded* in the house and shop, wherever they are impounded, they are considered as in the possession of the distrainer. We think therefore that this objection to the plea is of no weight.

Secondly; as to the second; it was admitted on both sides that it is sufficient if a plea be certain to a common intent. And we think that this plea is certain to a common intent; nay, that it would be departing from the natural and obvious sense of the words to construe them so as to make it bad. For when it says "the rest of the goods," that implies all that were not before sold with the consent of the plaintiff; and the words which follow are only an unnecessary description of these goods.

If the words had been only "the goods which remained unsold," there would have been some colour for this objection. But we think that the word "rest" excludes any such construction as is contended for on the part of the plaintiff.

But if there could be any doubt of this matter, and that in fact there were some goods which were sold without the consent of the plaintiff, we are of opinion that the plaintiff ought to have insisted on it in his replication, which he has not done.

As therefore we were all of opinion before that the replication was not good, and as we are of opinion now that the plea is good, notwithstanding the objections which have been taken by the plaintiff, judgment must be for the defendants."

JAMES FAWCETT *against* THOMAS STRICKLAND and
Nine Others.

Hil. 11 G. 2.
Monday,
Feb. 6th.

[E 10 GEO. 2. Rol. 383, 384.]

THE following opinion of the Court was now given by

Willes, Lord Chief Justice. "Trespass for driving and chasing with dogs seventy sheep, two mares, one gelding, and four cows, of the plaintiff, and for setting on and inciting the said dogs to bite the said cattle, at the parish of *Sedbergh*, whereby forty of the said sheep died, and ten of the said sheep and two mares and one gelding were driven to places unknown and lost, and the rest of the said cattle were hurt and greatly damnified.

It is likewise laid another way, for driving and chasing with dogs the same cattle in a place called *Blewcafter Common*, in the said parish of *Sedbergh*, whereby they were greatly hurt and damnified. Damage 40*l*.

The defendants all join in the same plea; and as to the force and arms and all the trespasss, except the driving and chasing the said cattle with dogs in the declaration first mentioned, they plead not guilty; and as to that they insist on a special justification, and set forth that *Thomas Strickland* the defendant at the time when &c was seised in his demesne as of fee of and in the manor of *Sedbergh*, within which said manor there are and at the said times when &c and also time immemorial there have been several large wastes or commons lying contiguous one to another without any separation, and parcel of the said manor, containing together 10,000 acres and more; and that the said *Thomas Strickland* being so seised of the said manor before the said time when &c did inclose 700 acres of a certain waste or common there called *Blewcafter Common*, being one of the said wastes or commons abovementioned and parcel of the said manor, with a wall and strong fence from the residue of the said wastes or commons, to hold to himself in severalty and to his

did leave sufficient common of pasture; and on these pleadings the defendant is entitled to judgment. But if the lord in exercising his right of approving injure the right of common of turbary, the person whose right is so injured may have an action against the lord.

Com. Rep.
577. S. C.
The lord of a manor may inclose part of a common against tenants having common of pasture, notwithstanding they have also a common of turbary, if he leave sufficient common of pasture.

—And if to trespasss for driving away a commoner's cattle from the common, the lord in his plea justifies under an approvement of the common, alleging that he left sufficient common of pasture for his tenants, and the plaintiff replies that he was also entitled to common of turbary, that therefore the lord wrongfully inclosed &c, and that he (the plaintiff) put in his cattle to enjoy his common of pasture; and the defendant demurs, it will be taken that the lord

Q

own

1737, 8.

FAWCETT
against
STRICK-
LAND.

own use, and did approve the same, there being then left by the said *Thomas Strickland* and remaining in the residue of the said wastes or commons not inclosed sufficient common of pasture for all the commonable cattle of all the tenants of the said *Thomas Strickland* of the said manor and of all other persons having common of pasture in the said wastes or commons, together with free ingress egress &c; by virtue whereof and of the statute the said *Thomas Strickland* at the times when &c was seised of and in the said 700 acres so inclosed in his demesne as of fee; and the said *Thomas Strickland* and the other defendants as his servants and by his command justify driving and chasing the plaintiff's said cattle as being damage feasant in the said 700 acres so inclosed.

The plaintiff replies that at the times when &c he was seised in his demesne as of fee of and in a certain messuage and forty acres of land called *Beckside* in the said parish of *Sedbergh*; and that he and all those whose estate he hath from time immemorial have had and used and were accustomed to have common of pasture in the said waste called *Blewcaster Common* for all his and their commonable cattle levant and couchant on the said tenements every year at all times of the year as appurtenant thereto; and that likewise he and all those whose estate he hath for time immemorial have had and used and were accustomed to have common of turbary in the said waste for his and their necessary fuel to be burned and consumed in the said messuage every year at all times of the year as occasion required, as appurtenant to the said messuage; and that the said *Thomas Strickland* inclosed 700 acres of the said waste called *Blewcaster Common* and approved the same unlawfully and contrary to the statute; and that the plaintiff being so seised of the said messuage and tenement &c after the said inclosure at the times when &c put the said cattle being his own and levant and couchant on his said messuage and tenement with the appurtenances into that part of the said waste so inclosed to eat up the grass there growing and to use his said common of pasture, and that the defendants of their own wrong chased the cattle as aforesaid whilst they were so doing.

To

To this replication the defendants demur; and for causes of demurrer say that the replication is double, for that two distinct and different matters, viz. the prescription of the right of common and the prescription of the right of turbary are insisted on in the replication, whereas one of those matters only ought to have been pleaded and insisted on; and for that the plaintiff in his replication hath not admitted or denied the sufficiency of the common of pasture in the residue of the said commons with free ingress egress &c; nor hath the plaintiff traversed or denied any other part of the plea of the said defendants; and for that the said replication is uncertain, insufficient, argumentative, and informal.

1737, 8.
FAWCETT
against
STRICK-
LAND.

The plaintiff joins in demurrer (a).

If there were no other objections to the replication than those which are particularly assigned as causes of demurrer, we are inclined to be of opinion that the replication is good. For we think that it was proper and necessary for the plaintiff to insist on his common of turbary in order to avoid the defendant's, *Strickland's*, approvement, and it was necessary for him to insist on his common of pasture in order to justify putting in his cattle. And we think that, by his not denying the sufficiency of the common of pasture in the residue of the said commons and the other matters insisted on by the defendants in their plea, he hath sufficiently admitted them.

But there is no occasion to give any positive opinion on these matters, because we are clearly of opinion that the replication is bad in substance, and that what the plaintiff has insisted on in bar to the defendant's, *Strickland's*, right, which is set forth in the plea, is not a sufficient answer.

There was another objection taken by the counsel for the defendants, which is not mentioned as a cause of demurrer, and which it may be proper just to take notice of in order to lay it out of the case. The objection was that the plaintiff does not set

(a) This case was twice argued, by Serjeants for the plaintiff; the second *Bootle* and *Burnett* Serjeants for the defendants and by *Eyre* and *Parker King's* argument was in *Michaelmas* Term 11 Geo. 2.

forth

1737, 8.

FAWCETT
against
STRICK-
LAND.

forth in his replication that he had a right to take common of turbary in that part which was inclosed, as it was necessary for him to do; for that common of turbary does not extend throughout the whole common as common of pasture does, but is confined only to such places where turves may be got. And for this purpose were cited 2 *Inst.* 412; 1 *Rel. Abr.* 399; 1 *Lev.* 231; *Hayward v. Cunnington*, *Fitz. N. B.* 123.; I have looked into the cases, which are very little to the purpose, and do by no means warrant the objection. But I believe the precedents have been both ways.

However the plaintiff in this case lays his right of common of turbary in *Blewcafter Common* generally, which must be taken to mean the whole common; and a man may certainly have a right of common of turbary throughout the whole common as well as common of pasture, though he cannot enjoy his right of common of turbary in those parts of the common where there are no turves any more than he can enjoy his common of pasture in those parts of the common where there is no grass.

We think therefore that there is no great weight in this objection.

But what the Court goes upon is that this is an action brought by the plaintiff for chasing and driving away his cattle put into the defendant's, *Strickland's*, inclosure to use and enjoy common of pasture; and therefore we think that, considering the nature of the plaintiff's action and the wrong which he complains of therein, the common of turbary is quite out of the case.

For though a lord cannot by virtue of the statute of *Merton*, 20 *Hen.* 3. c. 4. inclose and approve against common of turbary, and so it is expressly laid down by Lord *Coke* in 2 *Inst.* 87. in his comment on this statute, which we admit to be good law, yet we are of opinion that where there is common of pasture and common of turbary in the same waste the common of turbary will not hinder the lord from inclosing against the common of pasture, for they are two distinct rights.

Supposing one man has common of pasture and another has common of turbary in the same waste, he that has common of

pasture cannot justify throwing down the lord's inclosure, provided there be sufficient common of pasture left, because another person has common of turbary in the same common. And wherever rights are in their nature distinct, as common of pasture and common of turbary certainly are, we think it will be just the same though they happen to concur in one and the same person, as they do in the present case.

1737, 8.

FAWCETT
against
STRICK-
LAND.

If it were otherwise, it would be just the same in common of piscary and common of estovers, for Lord *Coke* says that the statute does not extend to either of them. And yet it would seem to be absurd to say that a lord cannot enclose against common of pasture, because his tenants or some other persons have common of piscary or common of estovers in the same waste; whereas his inclosure may be no interruption to their enjoyment of their common of piscary or estovers, nay probably their common of estovers may be better for such inclosure.

If indeed by such inclosure their common of piscary or their common of estovers were affected, or they were interrupted in the enjoyment of either of these rights, they might certainly bring their action, and the lord (to be sure) in such case could not justify such inclosure in prejudice of these rights. And so may the plaintiff in the present case, if he be interrupted in the enjoyment of his common of turbary: but by his present action he does not complain of any such interruption, nor does he insist upon any such matter in his replication.

As therefore his only complaint is of an interruption of his common of pasture, and as by the statute of *Merton* the defendant, *Strickland*, might certainly enclose part of the common notwithstanding the plaintiff's common of pasture, if he has left sufficient common of pasture, which in the present case is admitted by the pleadings, we are of opinion that the right of common of turbary insisted upon by the plaintiff in his replication is no answer to the defendants' plea; that therefore the replication is bad in substance; and that judgment, so far as the demurrer goes, must be for the defendants (a)."

(a) The case of *Shakespear v. Peppin*, determination on the authority of this case.
6 *Durnf. & East*, 741. received a similar

1737, 8.

FAWCETT
against
STRICK-
LAND.

The following private note was added in Lord Chief Justice Willes's note-book, from which the above judgment was taken ;

"Note. It was said in this case that an affize of turbary, piscary &c, did not lie at common law before the statute 13 Ed. 1. 2 Westm. c. 25.; and that therefore there is no such writ in the register for any common but common of pasture ; and for this purpose was cited *Webb's case*, 8 Co. 48 : But *Bracton*, lib. 4. f. 231. was cited to the contrary (a). However this be, I did not think that it was at all material in the present case, and have therefore taken no notice of it in my judgment."

(a) And *Ld. Coke*, 2 Inst. 412., mentions an instance of an affize for a common of piscary in the reign of *Hen. 3.*, before the making of the stat. 13 Edw. 1.; but then he adds "yet because (as hath

been said) there was no writ in the Register in those cases, therefore before this act no writ did lie by the general opinion of the Judges; but now this act hath cleared the question."

H. 11 G. 2.

Tuesday,
Feb. 7th.

Arbitrators cannot award the costs of reference, unless power is expressly given to them for that purpose.

—But if in such a case they award the plaintiff his costs of suit and charges of arbitration to be taxed by the proper officer, and the officer only tax the former, the award will be good for the former and bad as to the latter.

—An award may be good in part and bad in part.

—If arbitrators award the defendant to pay the plaintiff his costs of suit to be taxed by the proper officer before a particular day, it is the business of the defendant to have them taxed before that day.

JOHN CANDLER *against* JOHN FULLER.

THE opinion of the Court was thus delivered by

Willes, Lord Chief Justice. "Debt on bond entered into by the defendant to the plaintiff on the 21st of July 1733 in the sum of 100*l*."

The defendant prays oyer of the condition, which is to stand to the award of *Thomas Scotchmer* and *John Ling*, to whom all matters in difference between the parties were submitted, so as their award was made in writing under their hands ready to be delivered to the parties on or before the 20th of August next, if not, then to stand to the award of such person as the arbitrators should choose for an umpire, so as he made his award under his hand on or before the 27th of August next. And the defendant pleads that the arbitrators on the 17th of August 1733 made their award in writing under their hands and seals of and concerning the premises; and that they awarded that the defendant

his

his heirs executors and administrators should upon the 1st day of *September* next ensuing pay or cause to be paid unto the plaintiff the full sum of 8s. "with his costs of suit *and charges on that their arbitration* as the same should be taxed by the prothonotary of his Majesty's Court of Common Pleas at *Westminster* wherein the suit was depending, or as the parties within themselves should agree;" and that the plaintiff and the defendant after such payment should deliver to each other general releases of all matters to the 21st of *July* 1733; and the defendant avers that on the said 1st of *September* he tendered to the plaintiff 8s. and also a general release according to the award duly stamped and executed by him. And further pleads that he had no notice of the plaintiff's costs of suit mentioned in the said award or of his charges of the said award at any time before or upon the said 1st of *September*, and that the prothonotary of his Majesty's Court of Common Pleas at *Westminster* did not tax the plaintiff's costs of suit and charges on the said arbitration at any time on or before the said 1st day of *September*; and that no agreement was made between the plaintiff and the defendant at any time before or upon the said 1st day of *September* for ascertaining how much should be paid by the defendant to the plaintiff for his said costs or for his charges of the said arbitration, nor of or concerning the said costs and charges or either of them in any respect whatsoever.

1737, 8.

CANDLER
against
FULLER.

The plaintiff replies that after the making of the said award and before the suing out of the said original writ, to wit, on the 11th day of *December* in the year of our Lord 1736 *the plaintiff's costs of suit* in the said award mentioned were duly taxed by Mr. Prothonotary *Thompson* at the sum of 10l. 3s. 2d., of which the defendant the same day and year had notice and was then and there requested to pay him the said sum of 10l. 3s. 2d., which the defendant hath not yet paid, but hath refused to pay the same.

The defendant demurs generally, and the plaintiff joins in demurrer.

The defendant's objection to the plaintiff's replication was that the costs of the award were to be taxed before the 1st of *September*.

1733,

1737, 8.

CANDLER
against
FULLER.

1733, because they were to be paid on that day; and that it was incumbent on the plaintiff, who was to receive them, to get them taxed before that time, otherwise it was impossible for the defendant to pay them, and that his getting them taxed on the 11th of *December* 1736, which the plaintiff insists on in his replication, is entirely immaterial, the defendant not being obliged to pay them by the award, unless they were taxed before the said 1st day of *September*.

Several objections were likewise taken to the award; as that it does not appear in what suit the costs were awarded; that there was not time enough for the prothonotary to tax them between the date of the award and the time of payment; and that the arbitrators have awarded the costs of the arbitration, which they had no power to do.

To support this last objection several cases were cited: but I need not particularly take notice of them, because it is undoubtedly true that the arbitrators cannot award costs of the arbitration (a), it being a matter not submitted to them as arising subsequent to the time of submission. *Vid. Yelv. 98. Moor pl. 489. Cro. Eliz. 432. 2 Ventr. 242. Dyer 242. and Plowd. 396.* cited to this purpose.

But then the answer is plain, that an award may be good in part and bad in part, that is bad as to the matters that are not within the submission and good as to the rest, provided they are entire and distinct and do not at all depend upon the matters awarded which are not within the jurisdiction; and so it is expressly held in *Yelv. 98, Martbam v. Femx; Cro. Eliz. 432. Samon v. Pitt*; and in several cases that are mentioned in *1 Rol. Abr. 258 & 259 (b)*. The costs of the suit in the

(a) But if a cause be referred, the arbitrators may award the costs of the cause to be paid by either of the parties without any express authority for that purpose. *Roe d. Wood v. Doe, 2 Durnf. & East, 644.*—Where the arbitrator awarded the defendant to pay the plaintiff a certain sum “and the costs by him sustained in the said action, to be taxed by the proper officer”, it was holden that the award did

not include the costs of the reference. *Browne v. Marsden, 1 H. Bl. Rep. C. B. 223.* See also *Bradley v. Tunstow, Bos. & Pull. Rep. C. B. 34.*

(b) See also *Vanlore v. Tribb, 1 Rol. Rep. 437; Norton v. Lakins, Winch. 1; Pinkeny v. Bullock, 2 Lev. 3., Bargrave v. Atkins, 3 Lev. 413; Simon v. Gavil, Salk. 74; and Pickering v. Watson, 2 Bl. Rep. 1117.*

present case are certainly distinct from the charges of the arbitration; and therefore the award may be good for the costs of suit, and bad for the charges of arbitration, as it undoubtedly is in the present case.

1737, 8.

CANDLER
against
FULLER.

As to the objection that it is uncertain *what suit* is meant, we are of opinion that the award is certain enough. It is described a suit in this court; it must be taken to be between the parties; and we cannot suppose (no such thing appearing in the pleadings) that there was more than one suit depending. Nor can we suppose that between the 17th of *August* and the 1st of *September* there would not be time enough for the prothonotary to tax the costs.

In answer to the objection to the replication, the plaintiff took an objection to the plea, for that the defendant had not said that the prothonotary had not taxed the costs of suit and the charges of arbitration before the 1st of *September*, which might be true if he had not taxed the charges of arbitration though he had taxed the costs, which would be sufficient, the award being void as to the charges of the arbitration.

To this as well as to the defendant's objection to the replication several answers were given, which I need not take notice of, because we are all of opinion that there is another fatal objection to the plea.

For we are of opinion that it was incumbent on the *defendant*, who was awarded to pay the plaintiff his costs of suit, to procure them to be taxed by the prothonotary. As in case a man be awarded to convey an estate to another person by such a time, he is to procure the conveyances to be made. Or, to bring it nearer to the present case, if a man be awarded to convey an estate to another by such conveyances as shall be approved of by such a counsel, he is certainly to prepare the conveyances and to procure them to be approved of by that counsel.

S

We

1737, 8.

CANDLER
against
FULLER.

We therefore being of this opinion, the objection to the replication is out of the case, and judgment must be for the plaintiff(a)."

(a) Vid. *Storke v. De Smeth*, infra.Tuesday,
Feb. 7th.

Judgment
entered up
on a warrant
of attorney
against de-
fendant in
Jamaica, on
an affidavit
that he was
alive four
months ago.

Sr G. Co.
145.
Barnes 256.
S. C.

ROWNDELL *against* POWELL.

"**M**OTION to enter up a judgment on a warrant of attorney.

It appeared by the affidavit that the defendant was in *Jamaica*; and the affidavit was made by a person who came from thence in *September* last and arrived here about the middle of *January*; and he swore that the defendant was alive and well at *Jamaica* on the 12th of *September* last.

The Court doubted a little at first: but on consideration they granted the motion; for they thought that, considering the distance of the place, here was as good evidence of the defendant's being alive as the nature of the thing would admit of; that this was a matter left to the discretion of the Court; and that it would be a very serious consequence if the Court would not suffer a judgment to be entered up if the defendant were gone abroad."

H. 11 G. 2.
Friday,
Feb. 17th.

SAMUEL STORKE *against* CONRAD DE SMETH;
In Error. In the *Exchequer-Chamber*.

[E. 8 Geo. 2. Rol. 415.]

An award
may be good
in part and
bad in part,
provided the
latter be in-
dependent of
and uncon-
nected with
the former.
—But if the
arbitrators

award A. to pay B. 100l., and award A. and B. to give general releases to each other, and then award B. to pay A. 20l. at a subsequent time, the whole award is bad.

—So if the arbitrators award A. to pay B. 30l. on the 1st of January, and B. to pay A. 10l. on the 1st of February; the whole is bad.

THIS was an action of debt on a bond, dated 26 April 7 Geo. 2. in 2500l.

The defendant prayed oyer of the condition, which was that one *Philip W. Hingens* should stand to the award of *R. Drake* *J. Lloyd* and *J. Paice* of all matters in difference between *Hingens* and the plaintiff, so as they or any two of them made

their award before the 1st of *January* then next; and then pleaded that the arbitrators made no award.

1737, 8.

STORKE
against
DE SMETH.

The plaintiff in his replication set forth an award made by two of the arbitrators on the 31st of *December* 1734; in which the arbitrators awarded that *Hingens* on the 1st of *March* then next should pay to *Storke* (the plaintiff) 1496*l.* 5*s.* 8*d.*, and should execute and deliver to the plaintiff a general release of all claims &c, except such claims and demands as *Hingens* might have on him by reason or on account of one-fourth part of the proceeds of 113 casks of juniper-berries; and that thereupon the plaintiff should deliver up to *Hingens* two bills of exchange the one for 1000 dollars the other for 802 dollars, drawn on the 20th of *November* 1733 by *Hingens* on the plaintiff payable to the order of *J. Harniman* and accepted and paid by the plaintiff; and that the plaintiff should also deliver to *Hingens* an order in writing, ordering *Raguenau* and Co. to pay 987 dollars to *Hingens*, being the produce of 5 bales of damaged cloth consigned by the plaintiff to *Hingens* and by him delivered to *Raguenau* and Co.; and that the plaintiff, on the receipt of the 1496*l.* 5*s.* 8*d.* and of the general release by *Hingens*, should execute a general release to *Hingens* of all claims &c, except such claims as the plaintiff had or might have on him by reason or on account of 52126 pounds of fish thereafter particularly mentioned; and that the plaintiff should on or before the 1st of *March* then next pay two bills of exchange drawn by *Hingens* on the plaintiff, both dated the 25th of *Dec.* 1733, the one for 550 dollars and the other for 450 dollars, payable to the order of *Hingens* and accepted by the plaintiff. The award then recited that *Hingens* had consigned to the plaintiff 40 casks of juniper-berries, wherein *Hingens* was concerned one-fourth part, and had also consigned to the plaintiff 113 casks more of juniper-berries on account of the plaintiff as to three-fourth parts and on the account of *Hingens* as to the other fourth part; and the arbitrators declared that in making their award they had given *Hingens* credit for his part of the proceeds of the 40 casks of juniper-berries and also for three-fourth parts of the prime costs and charges of the 113 casks, but as to the proceeds of the one-fourth part of the 113 casks belonging to *Hingens* they had taken no notice thereof in their award,

1737, 8.

STORKE
against
DE SMETH.

award, the sales thereof not being finished before the said 26th of *April* then last: The award also recited that the plaintiff had consigned to *Hingens* a cargo of fish on the plaintiff's account, and that *Hingens* had consigned 52126 pounds thereof to *R. Ricca* who had not rendered any account of the sales thereof; and that *Hingens* had consigned to the plaintiff seven casks of white argol which had been consigned to him by *Ricca*, and which had been sold by the plaintiff for 29*l.* 15*s.* 7*d.*; and then the arbitrators awarded that the plaintiff should retain and keep the said 29*l.* 15*s.* 7*d.* towards payment and satisfaction of the proceeds of the fish, and that *Hingens* should account for the proceeds of the fish which should come to his hands over and above the 29*l.* 15*s.* 7*d.* to and with the plaintiff, and pay the same to him when he (*Hingens*) should receive the same, and not otherwise: *but if Hingens should on or before the said 1st of March then next make it appear by due proof that he had before the 26th of April then last accounted with Ricca for the net proceeds of the argol, then the plaintiff should within one month after such proof pay to Hingens the said 29l. 15s. 7d.*—The plaintiff, after thus setting out the award, assigned for a breach that *Hingens* had not paid 1496*l.* 5*s.* 8*d.* which was directed by the award to be paid to him on the 1st of *March* ensuing the date of the award.

To this replication the defendant demurred generally, and the plaintiff joined in demurrer; and the Court of King's Bench gave judgment for the defendant.

The record was then removed into the *Exchequer-Chamber* by writ of error; where after an argument by *Birch* Serjeant for the plaintiff in error, and *Parker* King's Serjeant for the defendant, that judgment was confirmed, the opinion of the Judges of the Court of Common Pleas and of the Barons of the *Exchequer* being thus given by

WILLES, Lord Ch. Just. C. B.—“We are of opinion that this is a most uncertain inconsistent and contradictory award. The whole is so, but I shall only mention two or three objections.

1st, A general release is directed to be given by *P. W. Hingens* on the first of *March* of all demands whatsoever, except a demand
of

of juniper-berries, and yet it is afterwards directed that the plaintiff is to account with and give to *P. W. Hingens* 29*l.* 15*s.* 7*d.*, being money which he received on his account for white argol; so that he is directed to release this demand and afterwards to pay it.

1737, 8.
STORKE
against
DE SMETH.

2dly, *P. W. Hingens* is directed to pay 1496*l.* 5*s.* 8*d.* on the 1st of *March*, even though it is admitted that the plaintiff has at that time of his in his hands 29*l.* 15*s.* 7*d.*, and that *P. W. Hingens* is not to deduct it, but is directed to pay it to him at a time subsequent.

3dly, The manner likewise, in which this 29*l.* 15*s.* 7*d.* is directed to be paid or retained by the plaintiff, is quite inconsistent with common sense (a).

It was indeed objected by the counsel for the plaintiff that an award may be good in part and bad as to the other parts, and that this award was good as to the payment of 1496*l.* 5*s.* 8*d.*, though bad in other parts of it; which was admitted on the other side to be true where one part of the award is entire and not dependent on the rest (b): but in this case the payment of this sum, in which the breach is assigned, is not independent of the rest. For the release which is certainly bad was directed to be given at the same time by *P. W. Hingens*; and the 29*l.* 15*s.* 7*d.*, which is admitted to be in the plaintiff's hands, ought in justice to have been deducted out of the 1496*l.* 5*s.* 8*d.*

We are therefore of opinion that the award is bad even in that part in which the breach is assigned, and that the judgment ought to be affirmed."

(a) The award with regard to the proceeds of the fish is *not final*, and therefore bad; vid. *Pedley v. Goddard*, 7 Durnf. & East, 73, and the cases there cited.

(b) Vid. *Candler v. Fuller*, *sup.* 62. and the cases there cited.

1738.

E. 11 G. 2.
Friday,
May 5th.Trover for
"old iron"
good after
verdict.Prac. Reg.
412. S. C.JOHN TALBOTT *against* THOMAS SPEAR.

"TROVER for several goods, to wit, one waggon, one bed and bedstead, two bushels of horse beans, one barrel of small beer, and "old iron;" to the value of 12*l*. The general issue pleaded, and verdict for the plaintiff."

It had been moved (a) in arrest of judgment that "old iron" was too uncertain:

But *per Curiam*. We will not arrest judgment for this reason. We cannot see how it could have been made more certain. If it had been *some old iron*, it had been equally uncertain, and yet *quandam parcellam fili* has been holden good. The only way that it can be made more certain in the case of *old iron* would be to say "so many pounds of old iron;" and yet the plaintiff would not be obliged to prove that quantity at the trial. So we do not see how this would at all help the defendant, or give him more light than as it is.

Besides these words are either certain and intelligible, or were made so by the evidence at the trial, or not. If they be certain and intelligible, or were made so by the evidence, then the objection vanishes: if they were not made so at the trial, but remained uncertain and insensible, then the jury could give no damages for them; and consequently for this reason the judgment ought not to be set aside; and of this opinion were both the Courts of C. B. and B. R. in *James Osborn's* case 10 Co. 130.

We are therefore of opinion that judgment ought not to be arrested for this reason, and that the rule nisi must be discharged (b)."

(a) It appears that this case was twice argued.

(b) Whatever degree of precision was formerly required in describing goods in a declaration in trover, as appears by *Gravel v. Rhobotham*, Cro. Eliz. 865, and in several of the ancient reports, in later times a greater latitude has been indulged in the action of trover than in detinue or replevin where the goods themselves are to

be recovered or returned. *Graves v. Drake*, Sty. 199; 2 Sid. 175; *Emery's* case cited in 1 Vent. 114; *Chamberlain v. Cooke*, 2 Ventr. 78; *West v. Davies*, 1 Lev. 301; *Jenny v. Norris*, ib. 303; *White v. Graham*, 2 Str. 827; *Radley v. Rudge*, ib. 738; *Hastlegrave v. Thompson*, cited in 2 Str. 810. *Harrison v. Bottomley*, 2 Ld. Raym. 1529, and 2 Str. 809; and *Hobbs v. Greeve*, Barnes 276.

1738.

Sir JOHN CHICHESTER *against* CHRISTOPHER LETH-
BRIDGE.

E. 11 G. 2.
Friday,
May 5th.

THE following opinion of the Court was delivered by

Willes, Lord Chief Justice. "This is an action on the case for obstructing a way; there are two counts. The first sets forth that the plaintiff was seised in fee of an ancient messuage in *Sherwell* near to the ancient town of *Barnstaple*, and that time out of mind the only way for persons travelling in coaches and chariots from the said capital messuage to *Barnstaple* aforesaid was in and through the several closes of the defendant (naming them) and so back again, every year and at all times of the year; and that he the said Sir *John Chichester* and all those whose estate he had and now hath in the said messuage with the appurtenances time out of mind have had and used and have been accustomed and of right ought to have and use the said way for himself and themselves and others travelling in coaches or chariots from the said messuage to *Barnstaple* in and through the said closes and so back again the same way every year at all times of the year as belonging to the said messuage; and then he lays an obstruction by the defendant.

The second count sets forth that time out of mind there hath been and is a certain common highway of necessity for all the liege subjects of our lord the now King and his progenitors &c travelling in coaches and chariots from *Sherwell* aforesaid to *Barnstaple* aforesaid in through and over the said several closes of the defendant, and so back again every year at all times of the year at their will and pleasure; and then the plaintiff sets forth that on the 26th of *November* 1736 and at divers other times between that day and the 30th of *January* in the said year he was travelling in his coach from *Sherwell* aforesaid to *Barnstaple* aforesaid and from thence back again in the said way in through and over the said close of the defendant, called the *Moggeridge*, as it was lawful for him to do, but the defendant to deprive him of the said way &c. did then and there stop up and obstruct the said

cult way, and that the defendant opposed him in attempting to remove the nuisance; sufficient damage to support the action.

A general way and a private way by prescription are inconsistent, and cannot be claimed together.
—Prescription for a right of way for A and others (not naming them) is uncertain, and bad even after verdict.
—A claim of a way of necessity from A. to B. for all persons is good.
—A prescriptive right of way for coaches &c is good after verdict.
—An action will not lie by an individual for an obstruction in a public highway unless he sustain a particular damage, which must appear on the record: but if the plaintiff state that the defendant obstructed &c by a ditch and gate across the road, by which the plaintiff was obliged to go a longer and a more difficult way, this is a suf-

1738.
CHICHES-
TER
against
LETH-
BRIDGE.

way by erecting fastening and locking gates bars and posts and digging trenches across the said way, and in his proper person withstanding and opposing the plaintiff from removing and abating the said obstructions, so that he the said plaintiff then and hitherto could not and cannot have or use the said way as he ought; but saith that he is damnified 40*l*.

The defendant pleads the general issue not guilty. Verdict for the plaintiff and several damages, viz. 1*d*. on each count.

Motion (a) in arrest of judgment, and several objections taken.

To the first count; 1st, that it sets forth a general way and a private particular way by prescription, which two rights are inconsistent.

2dly, That the plaintiff sets forth a right for himself and others (naming no persons) to go that way, which is too general, and not certain enough in a prescription, as was held in the case of *Underwood and Saunders*, 2 *Lev.* 178, where a man prescribed for himself and quibusdam aliis tenentibus, which was holden to be uncertain and not good.

And we are of opinion that by reason of these objections the first count is not good.

The objections to the second count were;

1st, That there can be no such thing as a way of necessity, and that such a right was never laid before.

2dly, That there cannot be a prescriptive right for coaches and chariots time out of mind, because coaches and chariots are of modern invention, and have not been in use here time out of mind.

3dly, That no particular damages are laid, which ought to be in the case of a public highway, (as this is laid to be,) otherwise an action will not lie.

As to the two first objections; we are of opinion that there may be a way of necessity (b); for if there be but one road to a place

(a) The motion was made in *Michaelmas* term 1737; and the case was argued in *Hilary* term following.

(b) Vid. *Clark v. Cogge*, *Cro. Jac.* 170; *Dutton v. Tayler*, 2 *Lutw.* 1489; *Parker v. Welsted*; 2 *Sid.* 39; and *Staple v. Heydon*, 6 *Mod.* 3, 4; and an anonymous case, *ib.* 149. Where one grants

land to another to which there is no access but over the land of the grantor, the grantee has a right of way over the grantor's land, as a way of necessity. *Howton v. Frearson*, 8 *D. & E.* 50. So if the owner of two closes, having no way to one of them but over the other, part with the latter without reserving the way

a place and no other way of going, that is a way of necessity. We are of opinion that the jury having found this, which is a matter of fact, and likewise found that there has been a way for coaches and chariots time out of mind, which is also a matter of fact, we cannot take notice judicially whether there have been coaches and chariots time out of mind or not, but must take it to be as the jury have found it.

And as to the third objection; we admit the general rule, but think that in this case there are particular damages assigned sufficient to support this action. The rule is laid down in *Co. Lit.* 56. that no one can have an action for a nuisance or obstruction in a common highway, without assigning some particular damage; and this to prevent multiplicity of suits; for otherwise every subject of *England* might maintain an action for the same obstruction. But notwithstanding this general rule it was holden in the case of *Hart v. Bassett* in *B. R. Tr.* 33 C. 2. reported in *Sir T. Jones* 156. that such an action as the present would lie. The case was this; the plaintiff declared that he was entitled to certain tithes, and that his direct way to carry them to his barn was in and through a certain highway, that the defendant had stopped up the highway by a ditch and gate erected ex transverso viæ, and that by reason of such obstruction he (the plaintiff) could not carry his tithes along the said highway, but was forced to carry them by a longer and more difficult way; verdict for the plaintiff and 5*l.* damages. It was moved in arrest of judgment that this being laid in a common highway the obstruction was a common nuisance, and that therefore the action would not lie, to prevent multiplicity of suits, for every one might bring the same action; and *Co. Lit.* 56. was cited: but it was resolved by the whole Court that the action lay; for they said that this rule, that an action will not lie for that which every one suffers, ought not to be taken too largely; for in this case the plaintiff sustained a particular damage; for the labour and pains which he was forced to take with his cattle and servants by reason of this obstruction might be of more value than the loss

1738.
CHICHESTER
against
LETHBRIDGE.

way, it will be reserved to him by law, as a way of necessity. *Ib. sem.*; and *Gre.* Jac. 170.

(b) Vid. *Blissett v. Hart*, Mich. 18 G. 2. post.

1738,
CHICHES-
TER
against
LETH-
BRIDGE.

of an horse, which has been holden to be sufficient damage to maintain such action (a).

Upon the strength and reason of this authority we are of opinion likewise to overrule the third objection to the second count; for the present case is stronger than the case in *Jones* in two circumstances; first, because it is expressly laid that the plaintiff was attempting to travel this road several times with his coach, but could not by reason of these obstructions; secondly, it is also laid that the defendant in person withstood and opposed him, and prevented him from removing the obstruction, which by law he might do."

"So the rule nisi was discharged, with a hint to the plaintiff (b) to take his judgment only on the second count."

(a) The general rule, that, where the plaintiff only sustains an injury in common with the rest of all the King's subjects by reason of a nuisance in the road or of the road being totally stopped up, he cannot maintain an action, seems to have been admitted in all the cases on the subject: but a question has frequently arisen whether the damage stated in each particular case were sufficient to bring it within the exception to the general rule; and this question has received various determinations according to the circumstances of each case. See the cases 27 *Hen.* 8. 27; *Moor* 180; *Feneux v. Houenden*, *Cro. Eliz.* 664; and *Paine v. Partrick*, *Carth.* 194; where the damage to the plaintiff was holden not to be sufficient to support an action; and those of *Fowler v. Sanders*, *Cro. Jac.* 446; *Maynell v. Saltmarsh*, 1 *Keb.* 847; and *Iveson v. Moore*, 1 *Ld. Raym.* 486; 12 *Mod.* 262; *Com. Rep.* 58; *Salk.* 15; and *Carth.* 451. where the damage was holden to be sufficient for that purpose.—It appears by the two former reports of the last case that according to the opinions of the Court of Common Pleas and Exchequer the action lay; but as the reasons of that opinion are not in

print, I have here subjoined the conclusion of a MS. note of that case taken from MS. coll. *Willes* Chief Justice: "But the Court (the King's Bench) being divided, the matter was reserved for the opinion of the rest of the Judges, who all agreed in the opinion of *Turton J.* and *Gould J.* that the action lay. The reason the Judges went upon was principally this, that it sufficiently appeared that the plaintiff must and did necessarily suffer a special damage more than the rest of the King's subjects by the obstruction of this way; because it was set forth that the only way to come to the coal pits from one part of the county was through this way, by which it must be understood, without any allegation of loss of customers, that the plaintiff did suffer particularly in respect to his trade by the plaintiff's wrong."

(b) In the case of *Russell v. the Men of Devon*, 2 *Durnf. & E.* 667. it was ruled that the plaintiff could not maintain an action against the inhabitants of a county brought to recover a satisfaction for an injury sustained by him in consequence of a county bridge being out of repair. See also *Vaugh.* 340.

1738.

ROBERT MALLOM on the Demise of JOHN MARSH
and JOHN AMYAS *against* JOHN BRINGLOE and
ELIZABETH his Wife and MARIA APOLLONIA
BURGESS (a).

E. 11 G. 2.
Monday,
May 15th.

[Tr. 11 GEO. I. Rôl. 1265.]

THE opinion of the Court was thus given by

Willes, Lord Chief Justice. "This ejectment for a messuage and lands in *Norfolk* came on upon a special verdict found before the late Lord Chief Justice *Raymond* at *Norwich* assizes.

The jury find that one *John Bedell* before the time of the trespass and ejectment was seised of the premises in fee, viz. 1st *February* 1707, and that he was brought up and educated in the popish religion. That he died on the 28th of *February* 1707, seised of the premises and professing the popish religion. That *George Bedell* was his brother and heir, and that he was born 1st *August* 1683, and was of the age of twenty-four at the time of the death of his brother; and that after the death of his brother he entered upon and became seised of the premises. And the jury find that the said *G. Bedell* in the year 1700 at the time of making the statute (b) intitled "An Act for the further preventing the growth of popery" was under the age of 18, viz. 17 years old. And that the said *G. Bedell* during his whole life was brought up and educated in and professed the popish religion; that he professing the popish religion and being above the age of 21, to wit, the age of 31, died; that he never took the oaths of allegiance and supremacy appointed to be taken by the said statute; and that he never made repeated or subscribed the declarations expressed in the statute 30 C. 2. And they further find that the defendant *Elizabeth Bringloe*, wife of the defendant *John Bringloe*, was the next protestant cousin (c) of the said *G. Bedell*, viz. one of the sisters and co-heirs of the said *John* and *George Bedell*; and that the said defendant *John* and his wife four days before the death of *George Bedell* entered

A papist,
who has not
taken the
oaths &c.
(under an in-
capacity to
hold under
stat. 11 & 12
W. 3.) may
devise lands
to a protest-
ant.
—He may
sell to a pro-
testant, by
stat. 3 Geo. 1.
c. 18. s. 4.
—He may
devise lands
for payment
of his debts
to protest-
ants; and,
semble, may
by a bond
chargelands
&c.

(a) This case is reported in *Com. Rep.*
570. by the name of *Matlem v. Bringloe*.
(b) Stat. 11 & 12 W. 3. c. 4.

(c) Proxima consanguinea protestantis in
the record.

into

1738.
 MALLOM
 dem. MARSH
 against
 BRINGLOBE.

into the mansion-house and the land thereunto adjoining, being part of the premises, and were thereof possessed. And the jury further find that the said *George Bedell* being so seised of the premises made his last will in writing, 9th *August* 1715, and duly signed sealed and published the same in the presence of three witnesses (therein named) who subscribed their names as witnesses in his presence, and that by his said will (which they find prout) he devised the premises in this manner; in the first place he devised to the lessors *John Marsh* and *John Amyas* and their heirs and assigns for the use of them their heirs and assigns for ever all and singular his manors messuages &c. on the trusts for the intents and purposes and subject to the limitations therein mentioned, viz. upon trust that they or the survivor of them or the heirs and assigns of such survivor shall in the first place out of the rents issues and profits thereof or by mortgage or sale as they shall think fit levy and raise money sufficient, together with his personal estate and in aid thereof, to pay satisfy and discharge all such sums as he should owe to *John Marsh* at the time of his death with interest and all his other just debts and the several legacies by him bequeathed with his funeral charges and the trustees' charges in the execution of his trust, and after satisfaction and payment thereof shall well and truly pay or cause to be paid to *Elizabeth* the wife of *John Mallom* Esquire an annuity of 150 *l.* a-year, free from taxes, for her life quarterly to her separate use &c; and upon further trust that they shall pay to his sister *Isabella Bedell* 25 *l.* a-year, to his sister *Maria Burgefs* 20 *l.* a-year, and to his sister *Elizabeth Bedell* 25 *l.* a-year during their lives quarterly, for their separate uses &c; and subject and liable to these annuities and to the payment of his debts legacies and funeral charges in case any part of his manors messuages &c. shall remain unfold the same are to be in trust to permit and suffer *Robert* son of the said *John Mallom* to receive and take all the rest residue and remainder of the rents issues and profits thereof until he shall attain the age of twenty-one years, and from and after such time as he shall attain the said age upon trust that the said trustees &c. shall at the request and charges of the said *Robert Mallom* convey the same subject to such mortgages as shall be made thereof for the purposes aforesaid and also after the said annuities to and for the sole use and behoof of the said *Robert Mallom*

Mallom his heirs and assigns for ever; with a direction that *John Mallom* the father shall not anyways intermeddle with the premises during the minority of his son, but that the same shall be under the sole care and management of the trustees &c; and in case the said *Robert Mallom* shall die before he shall attain his age of twenty-one, then he gives and devises the premises or what shall remain unfold, subject as aforesaid, unto his sister *Isabella Bedell Mary Burges* and *Elizabeth Bedell* their heirs and assigns for ever. Then he gives away several money legacies, and amongst the rest 500 l. a-piece to each of his trustees, the several legacies to be paid within six months after his death; and makes the said *John Marsh* and *John Amyas* executors.

1738.
MALLOM
dem. MARSH
against
BRINGLOE.

The jury then find that *George Bedell* died on the 19th of August 1715 so seised as aforesaid; and that the lessors entered on *John Bringloe* and *Elizabeth* his wife before the time of the demise in the declaration; and being so seised 1st April 10 Geo. 1. made a demise to the plaintiff for sixteen years from the Lady-day before, and that the defendants entered upon him and ejected him; and so submit the matter to the judgment of the Court.

Upon this special verdict two questions (a) were made.

1st, Whether *George Bedell* under the circumstances (as they appear in this special verdict) had a power to devise this estate to the lessors of the plaintiff *John Marsh* and *John Amyas*?

2dly, If he had, whether the trusts upon which he devised it make any alteration in the case?

As to the first point. 1st, It will be proper to consider under what circumstances *George Bedell* is found to be at the time of making this will?

2dly, What are the words of the statute under which the present case falls?

1st, It appears that this will was made after the disabling statute 11 & 12 W. 3. c. 4.; and it is found that *George Bedell* was under (b) eighteen at the time of the making thereof; that he

(a) This case was twice argued, the last time in Trinity term 1737 by *Wright* Serjt. for the plaintiff, and *Skinner* Serjt. for the defendants.

(b) Under the second branch of the fourth section of the stat. 11 & 12 W. 3.

c. 4. Papists above the age of eighteen are rendered incapable of purchasing lands &c, which includes a taking by devise. And accordingly it was ruled in *Fairclain d. Borlace v. Newland*, E. 15 G. 2. B. R.; 8 Vin. Abr. 73. pl. 4. that a devise to a

1738.

MALLOM
 dem. MARSH
 against
 BRINGLOE.

he never conformed by taking the oaths and subscribing the declaration according to that statute; that he was all along bred up and educated in the popish religion; and that he professed the same all his life-time, at the time of making the will and till the time of his death. He was plainly therefore such a person as is described in the first part of the disabling clause of that statute; and the words of that clause are that every such person "shall in respect of him or herself only, and not to or in respect of any of his or her heirs or posterity, be disabled and made incapable to inherit or take by descent any lands tenements or hereditaments within the kingdom of *England* &c.; and that during the life of such person or until he or she do take the oaths of allegiance and supremacy and make repeat and subscribe the declaration therein mentioned the next of his or her kindred, which shall be a protestant, shall have and enjoy the said lands &c. without being accountable for the profits received during such enjoyment as aforesaid; *but in case of any wilful waste* committed on the said lands &c. by the persons having or enjoying the same, or any other by his or her license or authority, the party disabled his or her executors or administrators shall and may recover treble damages for the same against the person committing such waste his or her executors &c, by action of debt in any of his Majesty's courts &c." The words of this statute are almost exactly the same as in the statute 1 J. 1. c. 4. s. 6.; only in that statute there are inserted the words "purchase, have, and enjoy:" there is no direction who shall have the mesne profits nor any words giving an action to the disabled person to recover

papist above the age of eighteen was void, and that a conveyance by such devisee to a protestant purchaser for a valuable consideration was also void.—In *Jones v. Meredith*, *Com. Rep.* 661. and *Bunb.* 346. it was holden that a protestant next of kin might redeem a mortgage made by a popish heir.—And in *Denn d. Warren v. Fernside*, 1 *Wils.* 176. it was determined by three Judges (against the opinion of *Foster J.*) that a lease for lives made to a papist was void, and consequently that the lease was not forfeited to the Crown by the papist's committing treason.—But the future consideration of these questions is

rendered almost unnecessary by the stat. 18 G. 3. c. 60. which repeals those parts of the stat. 11 & 12 W. 3. c. 4. respecting the incapacity of papists to hold lands &c, who take and subscribe an oath prescribed by sect. 4. An oath in some respects different is required by stat. 31 G. 3. c. 32. s. 1.; and the learned editor of the last edition of *Co. Lit.* seems to be of opinion that the oath prescribed by the stat. 31 G. 3. was not substituted in lieu of that in the 18 G. 3., but that it is advisable to take both. *Vid. Harg. Co. Lit.* 391. note 346; octavo edition.

damages

damages for waste; so these disabling words are rather stronger than in the present case. The words of the stat. 3 Jac. I. c. 5. which gives the mesne profits to the protestant next of kin are likewise pretty much the same, only the disabling part is not quite so strong as in the present case. But there likewise no action is given to the disabled person to recover damages for waste.

1738.
MALLON
dem. MARSH
against
BRINGLOB.

Having stated the clause of the statute which relates to the present case, the question which arises on it is whether, notwithstanding this statute, *G. Bedell* at the time of his will, and at the time of his death, had any estate in him which he could devise? For if he had any estate in him, there are no words in the statute which prohibit him from devising it to a protestant; so that it turns merely on this point, whether he had any estate in him?

Objection; That by the statute *G. Bedell* was a person entirely disabled to take any estate by descent, and therefore that nothing descended to him from his brother *J. Bedell*, nor could any estate ever vest in him, but that he is to be considered as a monk, or as a person civiliter mortuus. But we think that the cases bear no resemblance. For how can a person be considered as a person civiliter mortuus, who is capable of a gift or grant of any personal thing; who to all other purposes, except real estates, is under no disability at all; and who may even take the profits of the real estate as soon as he conforms; and who by the very words of this statute may, even before he conforms, bring an action of debt to recover damages for the waste committed on the real estate? Besides we think that in respect to the real estate he is not absolutely disabled to take, but only sub modo; of which sort there are many mentioned in *Co. Lit.* 2 and 3.

1st, He takes for the benefit of his protestant next of kin till his conformity;

2^{dly}, For the benefit of himself after his conformity;

3^{dly}, And for the benefit of his heir after his death;

4^{thly}, Nay for the benefit of himself during his life, by reason of the action which is given to him.

The inheritance of the estate must be somewhere. It is plainly not in the protestant next of kin.

1738.

MALLOM
dem. MARSH
against
BRINGLOE.

It cannot be in the Crown; because no inheritance is given to the Crown.

It cannot be in his heir; for *nemo est hæres viventis*; and therefore no one can take as his heir during his life.

The inheritance therefore must be in the person himself. Besides it must be admitted that it will descend to his heir after his death by the express provision of the statute; and his heir must claim through him; and if nothing ever vested in him, nothing ever can descend to his heir. This is certain and known law, and admitted to be so in the great case of *Thornby v. Fleetwood* (a), *Tr. 6 G. 1.* which was a case upon the first part of the statute 1 *Jac. 1.*; the disabling words of which are (as I have said before) much stronger than in the present case. And the resolution in *Tredway's case*, *Hob. 73.* which is a case on the statute 3 *Jac. 1. c. 5.* plainly supports this construction.

We think likewise that the inserting the clause concerning waste plainly shews that the Legislature considered the clause in this sense, not only because it gives the party damages for the waste as owner of the inheritance, but likewise because it gives him an action of debt, which seems to imply that if he had not been confined to an action of debt by this clause he might have brought an action of waste, and recovered the lands themselves where the waste was committed. As to the word "posterity" on which some stress seemed to be laid by the counsel for the plaintiff, it is difficult to put any certain signification on that word; and we think that the case is strong enough without it. It is a known rule in the construction of penal statutes that they must be construed strictly, and the words of them are not to be extended beyond their natural signification. And as this is a known and general rule, God forbid that our zeal for the protestant religion should make us in this single instance deviate from that rule. Besides this construction seems to be most agreeable to the intent of the Legislature. Their design in making this statute was not only to inflict a penalty on papists, but to weaken the popish interest by getting the lands of this kingdom out of the hands of papists. It could never therefore be their intention to prevent their devising them to protestants; nay to permit and encourage this seems to be rather in further-

(a) *Com. Rep.* 207; 10 *Mod.* 113; 356; 405; 1 *Str.* 318; 2 *Bro. Parl. Cas.* 203.

ance of the principal design of this act. As to the stat. 32 H. 8. c. 1. and the word "having", which was objected; I have already answered it; for if the inheritance be in the papist, then he hath it in him, and it is within the express words of the statute. We are therefore all of opinion as to the first point that *G. Bedell*, notwithstanding the stat. 11 & 12 W. 3., might well devise his estate to a protestant.

1738.
MALLOM
dem. MARSH
against
BRINGLOW.

The next question is, Whether any of the trusts that appeared in the present case do any ways affect or alter the case? It may be a doubt whether we can take notice of the trusts on a special verdict in an action at law, if it appear that the legal estate was well devised to the lessors of the plaintiff. And it would be proper for us well to consider this, if we had any doubt remaining concerning the trusts themselves: but we have none; the trusts have been already stated, and the only one which seems to afford any thing like an objection is the trust for the payment of *G. Bedell's* debts. The annuities and legacies are all given to protestants, and the remainder-man is likewise a protestant, for so they must all be taken to be, they not being found to be under any incapacity. And if a papist can devise his land to a protestant, he may certainly, for the same reason, devise any interest out of his lands to a protestant. And therefore this is founded on the same reason as *Roper* and *Radcliffe* (a).

But as to the case of debts, it is said that this is for the benefit of the papist: he may by this means spend all his estate in his life-time, for he may run in debt to the full value of his estate, and by devising his estate for the payment of his debts may frustrate the intent of the statute, and entirely defeat his protestant heir. Besides it might follow from this resolution that the bonds of a papist would affect the lands in the hands of his protestant heir. How that will be, it will be time enough to consider when it comes to be done: but that is not the present case in judgment before us.

And as to the present objection; in the first place it is proper to observe that the act has not prohibited it, and as Lord Ch. Just.

(a) 9 Mod. 167; 181; 10 Mod. 230; and 1 Bro. Parl. Cas. 450.

1738.
 MALLOM
 dem. MARSH
 against
 BRINGLOW.

Eyre said in the case of *Thornby v. Fleetwood*, we must take the law as it is. Besides I think that the Legislature intended to leave this power in him. By the 3 G. 1. c. 18. which is rather declarative of the sense of the Legislature than a new law, a papist may sell his estate to a protestant and do what he will with the money; which shews (what I have already observed) that the chief design of the Legislature was to get the lands out of the hands of papists. And if a man may sell his estate in his lifetime and do what he will with the money, It would be strange to say that he cannot devise it for the payment of his honest debts, nay even though all of them are owing to protestants (a), for that must be taken to be the present case, it not being said that any one of his debtors is under any incapacity. And surely it would be absurd to hold, what we have already established to be law, that a papist by his will may make out a voluntary devise of his estate to a protestant, but that he cannot devise it for a satisfaction of an honest debt due to a protestant. This would be directly contrary to a good rule that was laid down by a very great Lord Chancellor, that such a construction ought to be put upon a will that a testator may be just as well as bountiful: but this would be to enable a testator to be bountiful without giving him a power to be just.

We think therefore upon consideration, though it stuck with me a little at first, that there is nothing in this objection; and we are all of opinion that judgment must be given for the plaintiff (b)."

(a) So a protestant may devise lands to be sold for payment of his debts to papists. *Foone v. Pinkard*, *Ambl.* 320; and *Foone v. Blount*, *ib.* 767, and *Cowp.* 464.

(b) This case was recognized and approved in *Jones v. Meredith*, *Com. Rep.* 668.

1738.

H. HERVEY and CATHERINE his Wife, Daughter of Sir T. ASTON deceased, and ANN CLUTTON Widow and Relict of THOMAS CLUTTON deceased, another Daughter of Sir T. ASTON, - Plaintiffs,

Trin. 11 &
12 G. 2.
Monday,
June 5th.
In Chancery.

A N D

Dame CATHERINE ASTON Widow of Sir T. ASTON deceased, Sir T. ASTON Bart. eldest Son and Heir of Sir T. ASTON, Sir J. CHESHYRE Knt. H. WRIGHT, and A. KENRICK, - Defendants.

SIR T. *Aston* deceased, having a son and several daughters, by indentures of lease and release dated 27th and 28th of May 1712, conveyed to Sir J. *Chetwood* and J. *Crew* and their heirs all his manors &c to the use of himself for life, remainder as to certain parts to Lady *Aston* during her widowhood, remainder as to the rest and also to those parts after Lady *Aston's* estate to Sir T. *Aston* (one of the defendants) for life, remainder to the trustees to preserve contingent remainders, remainder to his first and other sons in tail male &c, remainder as to certain premises to Sir R. *Burdett* and Sir J. *Cheshyre* for 1000 years. The trusts of the term were, that, if Sir T. *Aston* (the father) died without issue male and should have only two daughters living at the time of his death, or born after, or who in his life-time should have been married with his consent, the trustees should raise 5000*l.* for the use of the younger of those two daughters *when and as soon as she should be married with the consent of Lady Aston* (if living, and not married again,) or if dead or married again then *with the consent of Sir R. Burdet and Sir J. Cheshyre* or the survivor; and if Sir T. *Aston* (the father) should have a son and more daughters than one at his death, then that the trustees should raise 2000*l.* for the portion of every such daughter, and pay the same to such daughters at the respective days of their marriage *with such consent as aforesaid.* The trustees were also to pay 50*l.* a-year a-piece to the daughters until their ages of eighteen, and afterwards

Bequest of money, to be raised on land, to daughters "when and as soon as they should marry with consent of trustees, and if they should die before marriage with such consent" then the portions should not be raised; two of the daughters married without consent; held that they were not entitled to their portions.

1738.

HERVEY
against
ASTON.

and until their marriage with such consent and during the widowhood of their mother 70*l.* a year a-piece. And *if any of the daughters should die before she or they should be married with such consent*, then the sum or sums intended for her or their portions should cease and the premises be exonerated therefrom, and if raised should remain and be payable to the person to whom the reversion should belong. On the 26th of *February* 1722 Sir *T. Aston*, by will, after reciting the above deeds and the purchase of other lands, devised those lands to *H. Wright* and *A. Kenrick* for 500 years on trust to raise 3100*l.* and 1000*l.* to be paid to his executrix as part of his personal estate, and subject thereto he devised this estate to such persons and for such estates &c as in the settlement. Then he directed that out of the sums so to be raised and other his personal estate there should be paid to each of his daughters who should be unmarried and unprovided for at the time of his death 2000*l.* in augmentation of their portions provided for them by the settlement, *to be paid to them at such times and subject to such conditions provisoes limitations and agreements as their original portions were by the said settlement made subject to; and in case any of his daughters should die before their original portions became payable, then the sum of 2000*l.* was not to be paid to her executors &c*; and he gave the residue of his personalty to Lady *Aston*. Afterwards on the 17th of *July* 1723 Sir *T. Aston* by a codicil directed that the term of 1000 years created by the settlement of 1712 should take place immediately after his death. On the 16th of *January* 1724 Sir *T. Aston* died leaving the defendant Lady *Aston* his widow, Sir *T. Aston* (another defendant) his only son an infant, and eight daughters, of whom *Catherine* the wife of *H. Hervey* and *Ann Clutton* (two of the plaintiffs) were two.

In *Easter* term 1725 the eight daughters, then unmarried, filed a bill in Chancery for proof of the will and execution of the trusts, which was decreed, with liberty for the parties to apply for further directions &c. In *Trinity* term 1734 Mr. *Hervey* and his wife and Mr. *Clutton* and his wife exhibited a bill of revivor. Lady *Aston*, in her answer, set forth that Mr. *Hervey* and *Catherine* his wife were both acquainted by her before their intermarriage with the terms and conditions upon which

which *Catherine* would be entitled to the respective sums of 2000*l.* mentioned in the settlement and will, that notwithstanding such notice they intermarried against her consent; and that the reason why she refused her consent was that Mr. *Hervey* could not make any settlement on his wife suitable to her fortune, or on their children, that Mr. *Hervey* made no proposal for making any settlement &c; and that Mrs. *Clutton*, being also acquainted with the conditions on which she would be entitled to her portion, intermarried without her privity or consent.

1738.

HERVEY
against
ASTON.

In November 1736 the Master of the Rolls decreed (a) that the plaintiffs were entitled to the portions under the settlement as well as to those under the will, and to interest from the time of their marriage.

The defendants appealed against this decree; and the case was heard before the Lord Chancellor, assisted by Lee Lord Ch. J. B. R., Willes Ld. Ch. J. B. C., and Mr. J. Comyns, who after hearing arguments at the bar were unanimously of opinion that the decree ought to be reversed.

This case is reported in 1 *Atk.* 361. The opinion of Mr. J. Comyns is also given at length in *Com. Rep.* 726.

The following opinion was delivered by

Willes Ld. Ch. J. C. B. "My Brother Comyns has stated the case and the clauses in the deed and will upon which the question arises so very fully and clearly that I will not go over them again. And the question, I think, when stripped of what does not belong to it, lies in a very narrow compass. But the case has been so obscured by the many distinctions that have been taken and the many cases that have been cited, that it will be necessary to remove these clouds before it can be cleared up. Before I take notice of the arguments and authorities that have been offered on the one side and the other, I will put some things that have been insisted on quite out of the way, as being in my humble opinion plainly foreign to the point in question.

And, first, what has been said in respect to penalties and forfeitures seems to me to be quite out of the case. Here no pe-

(a) Vid. *Cas. temp. Talb.* 212.

1738.

HERVEY
against
ASTON.

nalty or forfeiture is insisted on; but the bill and petition are brought by two of the daughters and their husbands in order to have two sums raised which are given to them by the settlement and will of their father; and the only question is whether the time is yet come when the same ought to be raised and paid. That the time may come hereafter, and that they will be entitled to these sums if they should happen hereafter to marry again with the consent of their mother, is admitted on all hands; so that the remainder-man in the settlement and the residuary devisee cannot now claim these sums as forfeited, nor can they ever be entitled to them until after the deaths of the daughters.

Every thing likewise that has been said in respect to the absurdity of entrusting so great a power in the executors administrators or assigns of the trustees may, I think, be laid out of the case; because this is not the case at present, but the question depends on the consent of the mother, and whether that be or be not necessary. The restriction may be good so far, though it should be against law to carry it any farther: not that I admit that it is so; but supposing that it were, yet the first restriction, on which only the question depends, may be very good. As supposing a man should give an estate on a condition undoubtedly good, and on this further condition that the party do not marry without the dispensation of the Pope, this last condition would certainly be unlawful, and yet it would not discharge the party from performing the other condition which is lawful.

I shall likewise lay out of the case all that has been said in respect to paternal authority, because no distinction is made in any of the cases between gifts by parents to children to which such a condition is annexed and gifts by mere strangers. For the validity of the condition is not at all founded on the authority of the father, but on the consideration of the gift and this known maxim *cujus est dare ejus est disponere*. If a parent should by deed or will restrain a child from marrying without the consent of another without annexing it as a condition to a gift, no one could say that such a restraint would be of any effect in law. And if a distant relation or a stranger give an estate or a sum of money to another on a condition, that con-

dition will be as obligatory, I mean in point of law, as if it were imposed by a parent.

1738.

HERVEY
against
ASTON.

Having thus delivered the question from what (I think) does not belong to it, what remains is only this, whether a man may give a sum of money to another when he or she marries with the consent of a third person, so that it shall not be payable to him or her until he or she perform this condition. For if it may be done by any words whatsoever, my humble opinion is that it is done in the present case, at least in respect to the portions given by the settlement.

The gentleman who spoke first for the plaintiffs began in the most artful manner for his client, and therefore spoke to the will first, as being certainly the best part of his case: but that method was not pursued by the rest, who began with the settlement. And the latter method seems to me the most natural one, the settlement not only being first in time, but the sum given by that being the original portion, the will referring to the settlement and the sum given by the will being expressly called an *additional* portion.

Two points have been made by the counsel, and I think very properly;

1st, Whether it were the intent of Sir *T. Aston* that the daughters should not have their portions until they marry with such consent as he has prescribed, or whether it were his intent that they should be entitled to them barely on their marriage though without such consent.

2dly, Whether, taking his intent to be that such consent should be necessary, such intent can take place according to the rules of law and equity. And these two are (I think) the only material questions both on the settlement and the will. I shall consider the first question at the same time both on the settlement and the will, the intent of Sir *T. Aston* being (in my opinion) manifestly the same in both. But on the second question, I shall consider the settlement and the will distinctly, the rules of equity being something different in respect to real and personal estates.

As

1738.
 HERVEY
 against
 ASTON.

As to the first question, concerning the intent of Sir *T. Aston*, though even that has been much controverted, I cannot help saying, as was said by a very great man who once presided in this court, that if this question were propounded to the best natural understanding unprejudiced by the learning of the law, the only doubt would be how this could come to be a question at all. For unless we lay aside the natural signification of the words, and make them to signify quite otherwise than they naturally and commonly import, the intent of Sir *T. Aston* both in the settlement and will is, I think, expressed as plainly as possible. In the settlement he directs that 2000*l.* a-piece shall be raised and paid to each of his daughters *when and as soon as they shall be married with the consent of Dame Catherine Aston if living, and in another place at their respective days of marriage with such consent as aforesaid*; and lest these words should not be certain enough, he expressly directs that *if they die before they are married with such consent the sums intended for their portions shall not be raised*; and until their marriage with such consent he gives them annuities for their maintenance. Then it was said that the words "with such consent &c." should be rejected: but no words, if sensible, ought to be rejected. If I had been to advise Sir *T. Aston* how to express his intent, unapprised of the distinction concerning dispositions over which is laid down in so many of the Equity cases, I should not have been able to furnish him with better expressions for this purpose. But he seems likewise to have been aware of this distinction, and therefore in case of his daughters marrying without such consent, he has given the portions over in as plain words as possible; "If any of the daughters shall depart this life before she or they shall be married with such consent as aforesaid, then the sum or sums intended for the portion or portions of her or them so dying shall cease, and the said premises be exonerated therefrom &c."

The only objection made to this is **that** he does not give them over *on their marrying without consent*, but *in case they die before such marriage with consent*. But these words were plainly put in to import that though the daughters married first without consent, if their husbands died and they married a second or a third time with such consent they would then be entitled to their

their fortunes (a). And this shews plainly (what I have before observed) that the question of a forfeiture is at present quite out of the case. I think therefore that nothing can be more plain than that Sir *T. Aston* intended that his daughters should not have the 2000*l.* provided by the settlement, unless they married with the consent of Lady *Aston*.

1738.

HERVEY
against
ASTON.

And his intent likewise seems to me to be equally plain as to the portions given by the will; for, to suppose that when he says that they shall "be paid at the same times, and subject to the same conditions provisoes and limitations as their original portions are subject to," he intended that they should be paid at different times and be subject to different conditions provisoes and limitations, is absurd and contrary to common sense. But, as if he foresaw this plain indisputable point might come hereafter to be disputed, to remove all possibility of doubt he subjoined these words "and in case any of my daughters happen to die before their original portions become payable, then my will is that the said 2000*l.* shall not be paid to the executors or administrators of such of them so dying:" after this, it would be trespassing too much upon your Lordship's patience and the common sense of all who hear me to say any more on this head.

I shall therefore take it for granted that the intent of Sir *T. Aston* was that neither of the portions should be paid to any of his daughters until they married with the consent of Lady *Aston*, if living. And if that were his plain intent, why should not his intent take place? Nothing I think can hinder it, unless it be inconsistent with the rules of law or equity, which is the next thing to be considered, and which is (I think) the only question that can admit of the least doubt.

And as to this, I shall consider the settlement and will distinctly.

(a) And upon this ground has the case of *Randal v. Payne*, 1 Bro. Chan. Cos. 55, been since determined. There the testator gave 4000*l.* to each of two devisees, provided they married into the families of *Gosling* or *Rivington*, otherwise the money was given over to the plaintiff; on the two devisees marrying into different fa-

milies, the plaintiff filed his bill claiming the 8000*l.*; as forfeited to him: but the bill was dismissed, the Lord Chancellor saying that the contingency of the devisees marrying into the two families named suspended the vesting of the 8000*l.* during the lives of the two devisees.

1738.

HERVEY
against
ASTON.

1st, As to the settlement. Where the intent of the party is plain and clear, as it is in the present case, I think that the rule of law or equity by which such intent is to be frustrated ought to be very plain too, otherwise the intent ought to prevail. For, as was said by Lord Ch. J. *Treby* in the case of *Bertie v. Lord Falkland*, "men's deeds and wills by which they settle their estates are the laws that private men are allowed to make; and they are not to be altered by the King in his courts of law or conscience, but we must take it as we find it" (a); and Lord *Nottingham* said in the case of *Parker v. Parker* (b) that in this case every man is his own chancellor. But the rules of law and equity are so far from being contradictory to Sir *T. Aston's* intent that in respect to the settlement all the cases are in favor of this construction, and I do not know one to the contrary; I mean, considering the portions given by the settlement by the rules which are laid down concerning lands, as it is a charge on the real estate, and I think it cannot be considered otherwise.

The gentlemen who argued for the plaintiffs were so conscious that all the cases were against them if this were to be considered in this light, that they insisted that this was to be considered as a mere personal thing, and consequently to be governed either by the rules of the civil law, or at least by the rules of equity in respect to the disposition of personal things. And their arguments were principally these, that this being a sum of money, though charged upon lands, must be considered as money; that it would go to the executors of the daughters and not to their heirs; and that even lands when devised to be sold and turned into money are always considered as money in a court of equity. But there is a great fallacy in this way of reasoning: it must, to be sure, be considered as money in respect to the interest of the daughters therein, and consequently will go to their executors and not to their heirs; and this is the case of every sum of money that is charged upon lands: but in respect to the lands on which it is charged and the heir who will be affected thereby, it must be considered on a different foot and be determined by a different rule than a portion given out of a personal estate. And the difference has always been if portions be given out of personal estates to be paid at such a time certain and the party die before the time, the portions shall be raised for the

(a) 2 Vern. 337.

(b) 2 Freem. 58.

benefit of his representatives: but if they are to be raised out of the real estate and so make a charge on the inheritance of the heir, if the party die before the day of payment, it shall sink into the inheritance for the benefit of the heir. So is the case of *Tournay v. Tournay* (a), *Pawlett v. Pawlett* (b), and many other cases (c).

1738.
HERVEY
against
ASTON.

As this sum of 2000*l.* therefore must be considered as a charge on a real estate and be determined by the rules concerning these sort of charges, all the cases are in favor of this construction; for the marrying with consent must be taken to be either a condition precedent or the limitation of the time of payment. If a condition precedent, the case of *Bertie and Falkland* (d) is an express authority that the Court cannot relieve against a condition precedent: nay in the case of *Fry v. Porter* (e), in respect to a condition annexed to lands the Court were clearly of opinion that they could not relieve against a condition subsequent in a case where no compensation could be made. If it be considered as the limitation of the time when the fortunes were to be paid (as it most properly seems to me to be) the cases of *Tournay v. Tournay* and *Pawlett v. Pawlett* which I have mentioned before and many other cases are determinations in point that the portions shall never be raised when the party dies before the time of payment is come.

This would have been so even if Sir *T. Aston* had not expressly declared that it should not be raised before: but it certainly strengthens the case that he himself has expressly declared the same. And taking it as a limitation of the time of payment, even the civil law (as my Brother *Comyns* has taken notice, and as I shall observe more at large on the other part of the case,) has determined that such gifts do not vest until the time of payment is come.

The only cases cited to the contrary stand upon particular reasons, and are plainly distinguishable from this.

The case of *Fleming v. Waldgrave* (f) depends on the particular wording of the condition "in case she did not marry con-

(a) *Pre. Chan.* 290.

(b) 1 *Vern.* 204; 321.

(c) See *The Duke of Chandos v. Talbot*, 2 *P. Wms.* 610 &c, and the cases referred to in *Cox's* edition, page 612, n. 1.; to

which may be added *Pearce v. Loman*, 3 *Vez. jun.* 135.

(d) 1 *Eq. Cas. Abr.* 110. pl. 10. and 2 *Vern.* 333.

(e) 1 *Ventr.* 199.

(f) 1 *Cas. in Chan.* 58.

1738.

HERVEY
against
ASTON.

trary to the liking of Sir *E. Waldgrave*;" and on this the Court principally relied, as it is said in the case of *Creagh v. Wilson* (a): besides the opinion of the Court, as it is reported, is scarcely reconcileable with the case itself; for it is said they were of opinion that it was not in the power of Sir *E. Waldgrave* to dispose of the lease otherwise than for the benefit of the feme sole &c, which is directly contrary to the power in the deed as there stated.

The case of *Ventris v. Glide* (b), as stated by the Master of the Rolls out of the Register, is a case that depends on particular circumstances not applicable to the present case; for there that was done which the Court thought was tantamount to a consent; otherwise there could never have been a decree for the portions according to the rule admitted in all the cases, for there was a plain devise over.

In the case of *Salisbury v. Bennett* (c) the trustees consented, and the Court were of opinion that the father himself had dispensed with the other part of the condition of marrying before sixteen.

The case of *King v. Withers*, as stated in the *Abridgment of Equity Cases* 112. is a case in point for the defendants in this respect, that Lord *Harcourt* declared that it being a portion to be raised out of lands must be considered as lands. But it is true that notwithstanding this, and though in that case there was a devise over, he declared that the portion should be raised. He therefore must have done so upon some particular reason; and the reason was plainly this, because the portion was made payable at the age of twenty-one or marriage, which should first happen, and the daughter was twenty-one before she married without consent; so the portion was absolutely vested in her before her marriage (d), and could not be divested by a subsequent act. The case of *Needham v. Vernon* (e) is a case very particularly circumstanced; and Lord *Nottingham* went upon

(a) 2 Vern. 573.

(b) Cited in 2 Vern. 343.

(c) 2 Vern. 223. Skin. 285.

(d) According to the report of this case in *Gilb. Eq. Cas.* 27. The Lord Keeper said, "The plaintiff must have her whole portion; for the testator has appointed two times, marriage or twenty-one, to entitle her to it; and here she has attained her

age of twenty-one, and that singly gives her a right to it. Indeed, if she had married before that age, she must have had her mother's consent, otherwise she was to lose 500 l."—Upon the same principle Lord *Camden* decided in the case of *Kuapp v. Noyes*, *Ambl.* 662.

(e) *Rep. in Chan.* 62.

this

this ground, that the portions were vested (a) in the daughters before the marriage by the particular words of the settlement; for in that case there was not so much as a marriage, but the daughters declared they would not marry, which is quite different from the present case: but even there he did not think proper to decree them their portions without making them give security not to marry without consent.

1738.
HERVEY
against
ASTON.

The cases, which were cited to shew that courts of equity will in some cases dispense with the performance of conditions, as for the payment of money and such other things, where an adequate compensation can be made, do not extend to these sort of conditions where no such compensation can be made, as was agreed by the Court in the cases of *Fry v. Porter* and *Bertie v. Lord Falkland*.

I am therefore of opinion that the plain intent of Sir *T. Aston* in respect to the 2000*l.* given by the settlement is not contrary to the rules of law and equity, but agreeable to those rules.

The case on the will is something more doubtful, but when thoroughly considered it will, I think, appear to be the same. In order to distinguish it some of the counsel for the plaintiffs took this method, and it was certainly the best they could take; they said that the will being relative to the settlement, it must be considered as if there were the same words in the will as the settlement, and then it would be either a void condition or a condition only in terrorem. That this is the case, if it is to be considered in this light, I do by no means admit. But for argument's sake, I will suppose there were the same words in the will as the settlement; and then it is argued that by the civil law, which must be the rule in respect to devises out of personal estates, the condition is absolutely void, and by the rules of equity must be considered as inserted only in terrorem.

1st, As to the civil law: I do not know that it is of any authority in this kingdom (and I hope it never will) any farther than as it is agreeable to reason and to our constitution,

(a) *Ld. Ch. Thurlow* seems to have proceeded on the same ground in *Jones* | *v. The Earl of Suffolk*, 1 *Bro. Ch. Cas.* 529.

1738.

HERVEY
against
ASTON.

and has been received as our law. But it was admitted by all the Doctors that they could cite no case where it has been determined in our Ecclesiastical Courts that these conditions are void; and the determination in this Court is expressly otherwise, for if the condition be void it could not be made good by a devise over.

2dly, Besides, it is not plain to me that the civil law held these conditions to be void. That law is that general restraints of marriage are void; and with this I would agree, though our law is otherwise, for the devise of an estate *durante viduitate* is certainly good. But that these conditions of marrying without consent are equally void depends only on the opinion of the commentators; and the reasons that they give for it seem to be absurd. The commentators, who were cited, put the case, if a legacy be given to a person *si arbitrato Titii nupserit*, and say it is the same as a general prohibition. For, *quid si Titius non consenserit?* Why then, to be sure, it is the same. But put the other alternative, *quid si Titius consenserit?* (which may as well be supposed) and then there is end of the argument. *Swinburn* and others admit that if a legacy be given to a person in case she does not marry a particular person &c, this is good; and yet I might as well argue that that is a general prohibition; for what, if no one else will have her, which is the same as *quid si Titius non consenserit?* This shews the weakness of those sort of reasons. *Swinburn* (and so likewise did the counsel for the plaintiffs) relies very much on the great inconvenience that it would be to the public and the commonwealth if these restrictions were to be laid on marriage. Whether or no more inconveniences do not arise from improvident marriages than from these restrictions it may be very difficult to say. But *Swinburn* has put a case himself that makes all his reasons of this sort ridiculous. He says if there be a devise over to some poor scholars at *Oxford*, such a condition is held to be good; so that providing for a few poor scholars quite overbalances all the inconveniences that may arise to the commonwealth.

But even the civil law I think, if it be taken into the case, seems to agree with the intent of the testator. The rule of the civil law (mentioned by my Brother *Comyns* as from *Swinburn*) is,

is, that where a sum is made payable at a day certain, which must come one time or another, dies legati credit sed non venit, that is the legacy is vested but the time of payment is not come; but where it is payable upon a contingency, there they say dies legati nec credit nec venit; and if the party die before it happens, there is an end of such legacy. This distinction was taken notice of by Lord Talbot and relied on in a case determined by him; and I have been informed your Lordship has declared yourself of the same opinion; and that I think is plainly the present case.

1738.

HERVEY
against
ASTON.

It has been said that the civil law makes no distinction between conditions precedent and subsequent. I will not dispute about words, but it is plain in effect that they have such a distinction; for it has been agreed that the legacy in this case will not become payable until after marriage, so marriage is in effect a condition precedent. And in the case of the limitation of the time of payment, which the present case plainly is, they hold even that a legacy may be given in this manner. For *Swinburn, part 4. §. 12. rule 19.* puts this case; if a man give another the use of his goods, or make him his executor, so long as he shall remain unmarried, the gift or executorship determines on the marriage; and why the commencement of a legacy may not be on a marriage by consent as well as the determination of it on a marriage generally I am a loss to guess. So that the civil law seems to agree with our law in this, and so far I am for receiving it and no farther.

As to the rules of this court; there is no case of a limitation of time as the present case. The cases are so obscure and inconsistent that I am almost unwilling to mention any of them. But it is a rule generally received here that these sort of devises are only in terrorem unless there be a devise over (a). The case of *Creagh v. Wilson* seems to be the only case where this rule is departed from; and there the condition was holden good, though there was no devise over. But I would endeavour to make this rule a reasonable and intelligible rule if possible; and I think it can be made so in no other way than by considering a devise

(a) Ruled in *Reynish v. Martin*, 3 Atk. 330, and 1 Wils. 430, and in *Wheeler v. Bingham*, 1 Wils. 135 and 3 Atk. 364, where a personal legacy was given on con-

dition of marrying with consent, and was not given over, that the condition was merely in terrorem.

over

1738.

HERVEY
against
ASTON.

over as an evidence of the intent of the testator &c, without determining that this intent cannot be expressed in any other way. When therefore it is said that the devise is only in terrorem, it is laid down not as a rule of equity that these devises can be only in terrorem, but that if there be no devise over it shall be taken that the testator intended it to be only in terrorem, and so is only an evidence of his intention: but where he expresses his intent to be otherwise, it would be absurd to say that he intended it to be in terrorem. Suppose there should be no devise over, but the testator should declare expressly that he did not intend it to be in terrorem only, or should make use of other declarations of his intention as strong or stronger than a devise over, shall a court of equity say notwithstanding that it shall be only in terrorem: this would be to make men's wills, and not to carry them into execution. The case indeed of *Haywood v. Pagett*, determined by the present Master of the Rolls in Nov. 1733, seems to contradict this; for he determined that even a devise over will not alter the case if it be to a residuary legatee. But this is a single case; and though I have the greatest regard for his authority as he is a very great master of equity, as I cannot see the reason for this distinction, I own that this case is to me of no weight; and it is directly contrary to the case of *Amos v. Horner*, *Eq. Cas. Abr.* 112. *Mich.* 1699. That was a bequest of 100*l.* to a daughter if she married with consent, if not 50*l.*; and a devise over of the residue of his estate; and it was holden that the daughter who married without consent should have but 50*l.* It was said that this decree was not to be found on a search in the Register's Book: I have examined into this, and find that on the first hearing of this cause there were not proper parties: but it appears from the Register's Minute Book M. 1699 that the cause came on again and that a decree was made, though no decree was ever drawn up; the reason of which might have been, because it was against the plaintiff; if it had been for him, he would certainly have drawn it up. Upon this I inquired of the author of the book, who told me that he had this case from a person of very good credit, who told him that he had it from a person of indisputable skill and veracity who took it himself in the Court of Chancery; so I think that this authority seems to be pretty well established.

I have hitherto argued on a supposition that the very words of the settlement were inserted in the will; and if they were, then I think there must be a limitation over to the heirs of Sir T. Aston, and that would put an end to the question. But I think this is not the proper way of considering the case; for when the testator has given it *on the same conditions &c.*, such words must be inserted as will signify the same in a will as the others do in a settlement, and not such as will have a different construction though the same words. As for example; suppose a man should by will give his estate in D. to A. and his heirs male, and should direct that his trustees should convey his estate in S. to the same uses, must the conveyance be drawn in the same words as the will? Certainly not, because then the uses would be different: but the conveyance must be to A. and the heirs male of his body (a). And if words are to be inserted in this will, they must certainly be such words as would make the portions payable at the same time and subject to the same conditions &c as the portions given by the will; and if so, there is an end of the question. Besides there are words in this will, which I just hinted at before, which I think take away all doubt, and make this case quite different from any that has happened before. For he says expressly that "if any of his daughters should happen to die before her or their original portions become payable, then the said 2000*l.* should not be paid to the executors &c of such of them so dying." If therefore one of these daughters were dead, it is plain that her executors could not recover the portion: and why not? Because the testator declared it should not vest before such marriage; for if it did, it would go to the executors, and yet if it be determined that the plaintiffs are entitled, it must be upon this supposition that it did vest before. Suppose a daughter and the executors of another daughter were to join in a bill of this sort, the executors could not recover by the express words of the testator; and if the daughter should have a decree notwithstanding, it would be the most inconsistent decree that ever was made.

Much has been said to shew that courts of equity in cases of the fortunes of children, who are considered as creditors, will

(a) Vid. 1 P. Wms. 106; 143; 291; 622.

1738.

HERVEY
against
ASTON.

1738.

HERVEY
against
ASTON.

dispense with circumstances and supply defective provisions. But this, I think, is not applicable to the present case; for the Court will assist children where the intent of the father is plain but the deed or will which gives them the provision is defectively or improperly drawn: but I do not know that this Court will in any case go beyond the intent of the father and say that a child shall have a portion where the father has declared that he shall not, or upon other conditions than the father has given it to him. Lord Ch. J. *Kelyng* was of another opinion in the case of *Fry v. Porter*; for he said that it is fit to keep these bonds which parents impose upon their children strict, and Lord Keeper said, "I am glad now that we are delivered from a common error, and that men may make such provisions as will bind their children (a)."

There may perhaps be great hardships in the present case, and I am heartily sorry that there are; but the hardships of a particular case are no foundation for a determination either in a court of law or equity. I should be glad indeed if I could find out a reasonable and a legal distinction to assist in a hard case, but I can find none in the present case to distinguish between the settlement and will, except one which I but just submit to your Lordship: but I own it was not relied on in any of the cases though it occurs in many of them. The distinction is that in the case of the will Lady *Aston*, who is to consent or dissent, is the residuary legatee and consequently the person to take advantage of her own dissent; and whether in such a case it may not be reasonable for a court of equity to inquire whether such dissent were reasonable (b) or not, I submit; as I believe the Court would have done so in case the daughters had brought a bill before marriage to oblige Lady *Aston* to consent. There is a rule in the civil law, which was cited by Dr. *Strachan* from *Gothofred's Comment on the Digest*, which seems to favor this opinion; for it is said that a legacy cannot be made to depend on the consent of the heir, because it cannot be supposed that he will consent. If your Lordship thinks that there is nothing in this distinction, I am then humbly of opinion

(a) 1 *Mod.* 313.

(b) Lord *Mansfield* seems to have entertained the same opinion in *Long v. Dennis*, 4 *Burr.* 2056, 7, where he said, "One of

the trustees is become one of the devisees over; therefore a cause of objection ought to be shewn." See also *Mesgrett v. Mesgrett*, 2 *Vern.* 581.

for

for the reasons which I have already offered that the plaintiffs are not at present entitled to their portions either by the settlement or the will,

1738.

HERVEY
against
ASTON.

I am glad I am so fortunate as to agree with my Brother *Comyns* for whose judgment I have a great respect, but I am sure we shall both of us readily submit our opinions to your Lordship's much better judgment (a)".

(a) In *Mercer v. Hall*, 4 Bro. Ch. Caf. 326. a general consent to marry whom the devisee pleased was holden sufficient. In *Daly v. Clanrickarde*, 4 Burr. 2055, reported in 2 Atk. 261 by the name of *Daly v. Desbouverie*, a conditional consent was sufficient. In *Crommelin v. Crommelin*, 3 Vez. jun. 227, the condition was holden not to extend to a second marriage,

the daughter having married between the date of the will and the father's death, and being a widow at the time of his death. And in *Lord Strange v. Smith*, Amb. 263. it was ruled that the trustee, having once consented, could not afterwards withdraw his consent.—See the case of *Scott v. Tyler*, 2 Bro. Ch. Caf. 431.

THOMAS COCKERILL against MATTHEW ARMSTRONG and Six Others.

Trin. 11 &
12 G. 2.
Tuesday,
June 20th.

THE opinion of the Court was thus delivered by

Willes, Lord Chief Justice. "Trespass for taking leading away and impounding a gelding of the plaintiff's and for keeping him in pound for the space of four days &c; Damage 30*l*.

The defendants all pleaded a special plea, that the place where the gelding was taken at the time when &c was a close called *Weapness* containing 1000 acres of pasture ground; of which said 1000 acres the bailiffs and burgeses of the borough of *Scarborough* were at the time when &c seised in their demesne as of fee, and because the said gelding in the declaration mentioned at the time when &c was in the said 1000 acres feeding upon and eating the grafs there growing, and doing damage there, the said *Matthew* &c as servants of the bailiffs and burgeses of the said borough and by

De injuriâ suâ propriâ absque &c is not a good replication, where it puts several matters in issue; —As where replied to a plea (to trespass for taking cattle) that A. was seised in fee of the locus in quo, and that defendants as his servants took the horse damage feasant. —Nor can it be replied where defendant either in his

own right, or as servant to another, claims an interest in the land or way &c. —Nor where the plaintiff in his declaration makes a title to any thing and the defendant pleads another thing against it or in destruction of the cause of action; there the plaintiff must reply specially. Com. Rep. 582. and 7 Mod. 247. 8vo. edit. S. C.

their

1738.
 COCKERILL
 against
 ARM-
 STRONG.

their command took the said gelding so feeding and doing damage there, and impounded the said gelding in the common and open pound at *Scarborough* aforesaid, and detained him there for the time mentioned in the declaration, as it was lawful for them to do; which is the same trespass &c.

The plaintiff replies that the defendants took away and impounded the said gelding of their own wrong without any such cause &c.

The defendants demur; and for cause of demurrer shew that the plaintiff in his replication hath traversed the said several matters contained in the plea, whereas he should have traversed one single matter, whereon a proper issue might have been joined; and that the said replication is uncertain &c. The plaintiff joins in demurrer.

The single question is (a) whether *de injuriâ suâ propriâ absque tali causâ* be a good replication; and we are all of opinion that it is not a good replication, for two reasons, both expressly laid down in *Crogate's case*, 8 Co. 66.

The first of them is the reason assigned as the cause of the demurrer, because it puts several things in issue whereas the issue ought to be plain and single. For upon this issue the defendants must prove that the bailiffs were seised in fee (or at least that they were possessed;) that the defendants acted by their command (b); that the gelding at the time when he was taken was in a close called *Weapness*; and that he was depasturing the grass and doing damage there (c).

The

(a) This case was twice argued, the first time in *Easter 1738* by *Eyre King's Serjt.* for the defendants and *Bootle Serjt.* for the plaintiff; and again on the 10th of *June 1738* by *Wynne Serjt.* for the former, and *Burnett Serjt.* for the latter.

(b) The distinction is between trespass *clausum fregit* and an action of trespass for taking cattle or replevin: in the first case, if the defendant justify entering by command or as bailiff to A. in whom he lays

title, the plaintiff cannot traverse the command in his replication: but in the two other cases if the defendant justify taking the cattle as bailiff to A. in whom he states the title to be, there the command is traversable. *Lee v. —*, 1 *Roll. Rep.* 46; *Fuller v. Trimwell*, 2 *Leon* 215; and *Trevilian v. Pyne*, *Salk.* 107.

(c) But though the plaintiff can only put one single point in issue, it is not necessary that that point should consist of a single fact;

The other rule which is laid down by Lord *Coke* is that when the defendant in his own right or as servant to another, claiming any interest in the land or any way or passage therein or rent issuing thereout, justifies the trespass, *de injuriâ suâ propriâ absque tali causâ* is not a good replication (a): and *Crogate's* case is exactly parallel to this, only the present is a little stronger. There the action was only for *chasing the plaintiff's cattle*, which does not so much as imply any claim of right in the defendant: but here it is *for taking away and impounding*, which seems to imply a claim of right. And the plea is almost the same as this; for the defendant justifies as servant to one who claims a right in the place where, only it is not said there that the cattle were damage feasant. So that in that respect likewise the present case is stronger than that. And yet though the case in *Coke* is not so strong as the present in these two respects, *de injuriâ suâ propriâ absque tali causâ* was holden on a demurrer by the whole Court after a solemn argument not to be a good replication.

1738.

COCKERILL
against
ARM-
STRONG.

I do not at all rely on the case in *Cro. Jac.* 599, because *absque tali causâ* is there omitted. But the case of *Taylor v. Markham*, *Cro. Jac.* 224, and *Yelv.* 157 (b), though cited for the plaintiff in this case, makes I think rather against him. The case itself is plainly distinguishable from this; for the action is an action of assault and battery, where the title of the land can never possibly come to be material. But it is expressly there laid down that where the plaintiff in his declaration makes a title to any thing and the defendant pleads another

(a) It has since been determined, in *Jones v. Kitchin*, *Bos. & Pull. Rep. C. B.* 76., that a plea *de injuriâ suâ propriâ absque tali causâ* to a cognizance for rent in

arrears is bad:—See also the observations of the Lord Chief Justice *Eyre* on this case, as it is reported in *B. N. P.* 93.

(b) 1 *Brownl.* 215. S. C.

fact; for in *Robinson v. Raley*, 1 *Burr.* 316. where to trespass the defendant justified under a right of common, the plaintiff in his replication traversed "that the cattle were the defendant's own cattle, and that they were levant and couchant upon the premises, and commonable cattle," the replication was on a special demurrer (assigning for cause that it was multifarious)

holden to be good.—So, according to the first resolution in *Crogate's* case, "on a justification by force of any proceeding in the admiral court, hundred or county, or any other which is not a court of record, there *de injuriâ suâ propriâ* generally is good, for all is matter of fact and all makes but one cause."

D d

thing

1738.
 COCKERILL
 against
 ARM-
 STRONG.

thing against it or in destruction of the cause of action of the plaintiff, there the plaintiff must reply specially, and de injuriâ suâ propriâ absque tali causâ is not a good replication; which is exactly the present case. And there is a case cited in *Yelv.* out 14 *Hen.* 4. 32. trespass for taking the plaintiff's servant; the defendant pleaded that the father of the person taken held of him by knight's service and died seised, the person taken being under age, and that he seised him as his ward; the plaintiff replied de injuriâ suâ propriâ absque tali causâ, and held to be no good replication; which case seems to be exactly parallel to the present. I do not rely at all on the case of *Cooper v. Monke* and others (a), which was determined in this court as to this point in *Hilary* term 1737; because that was an action for breaking and entering an house, which to be sure is plainly distinguishable from the present case. The case in *Cro. Eliz.* 812. of *Whitnell v. Cook* seems to be a case in point. Replevin for taking cattle; the defendant, as bailiff to one *Pyne* seised of the third part of the place where, justified taking them damage feasant; the plaintiff pleaded that a stranger was seised of the other two parts, and that he put the cattle in by his license, de injuriâ suâ propriâ &c by the defendant; and that held on a demurrer not to be good, but judgment for the plaintiff.

It is said indeed in the case of the *Archbishop of Canterbury v. Kemp*, *Cro. Eliz.* 539. that where the defendant himself claims an interest in lands this is not a good replication, but where he justifies by command of another claiming interest, there it is: but this seems to be a distinction without a difference, as the title to the land must equally come in question, and is alike necessary to be proved in both cases; and it is directly contrary to *Crogate's* case.

Whether or no in the present case it was necessary for the defendant to set forth a title, or whether he might have relied only on a possession, (as this is not a quare clausum fregit, but an action for taking a personal thing without claiming any right to the place) we need not determine, (though I think it

(a) *Sup. Hil.* 1737, page 52.

was not necessary;) because he having insisted on a seisin in fee, we think it is more than an inducement (a), and that it is necessary to prove it, or at least a possession which is *prima facie* a proof of a seisin in fee, and will be exactly the same thing in respect to the present point. And there is a plain difference between the present case and the case of an action for an assault and battery; because there if the party be possessed, even though the plaintiff should have a title to the house or place it will signify nothing? for his bare possession will justify him even turning the right owner out of the house: whereas here if the plaintiff has a right to the place where &c for right of common &c, it may quite destroy the defendants' plea. And the present case is the stronger, as the defendants have specially assigned this as a cause of demurrer.

We are therefore all of opinion that judgment must be for the defendants (b).

(a) But where a matter of record or title is only alleged as inducement to the plea, there a replication de injuriâ suâ propria generally is good. *Hale v. Gerrard*, *Latch* 221; and *Taylor v. Markham*, cited *sup.* 101.

(b) Vid. *Ball v. Wardell*, *East*. 1740, *post*.

1738.
COCKERILL
against
ARM-
STRONG.

MILLISENT SHIPMAN *against* A. THOMPSON.

THIS came before the Court on a case reserved at the trial before Mr. Baron Fortescue.

The plaintiff's late husband by his will made the plaintiff and Dr. Morgan (since deceased) his executors. In his life-time he had appointed the defendant his steward by letter of attorney, who after the testator's death received of several tenants several sums of money due to the testator in his life-time. The plaintiff brought this action in her own name, not naming herself executrix, for the money so received. The defendant gave notice to set off several sums due from the testator to him, which the Judge would not permit the defendant to set off.

Trin. 11 &
12 G. 2.
Monday,
June 19.

An executor may recover in his own name money due to the testator in his life-time and received by the defendant afterwards. — In such an action the defendant cannot set off a debt due to him from the testator. *Bull. N. P.* 180. Sir G. Cook, 151.

Pract. Reg. 268. 7 *Mod.* 246. 8vo. edit. S. C.

The

1738.

SHIPMAN
against
THOMPSON.

The questions reserved were; 1st, Whether the plaintiff should not have declared as executrix;

2dly, Whether the defendant ought not to have been permitted to set off the money due to him from the testator.

The Court, after argument, gave

Judgment for the plaintiff (a).

(a) The reasons given by the Court of Common Pleas do not appear in Lord Chief Justice *Willes*'s papers: but the same case was referred to the opinion of Mr. B. *Fortescue* (1) before whom the cause was tried, and who in the *Easter* term preceding after hearing the case argued by Mr. *Makepeace* for the defendant and Sir T. *Abney* for the plaintiff gave the following judgment in favor of the plaintiff.

"It is insisted on for the defendant that this money received by him is vested in the executrix in *auter droit*, that as she hath no right of her own the action must follow the right, and that therefore she should have brought the action as executrix and not in her own right. And the case of *Hutton*, cited in 6 *Mod.* 4. was cited, where it is said if executor bring trover and declare that he is possessed as executor to J. S., if on evidence it appear that they were his own goods he shall be nonsuit and pay costs; and it was insisted that by a parity of reason where the exe-

cutor brings an action in his own name and it appears that they were the goods of the testator, he ought to be nonsuited. As to this; there is no doubt but that the plaintiff in this case is entitled to all the effects of the testator in *auter droit*, and all executors are: but if this were an universal rule that therefore the action must follow the right and be brought as executor, the executor could in no case bring an action in his own name for any goods or effects of the testator, which in some cases it is certain that he may. As where the testator's goods are taken out of the possession of the executor, he may bring trover in his own name (2), because it is an immediate tort to him, though he is possessed of these goods in *auter droit*. By this also it appears that it is not a necessary consequence that, because if the action is brought in the plaintiff's name as executor and the goods appear to be his own he must be nonsuit, therefore he must be nonsuited if he bring the action in his

(1) It seems to have been not unusual at this time to refer the case at first to the Judge who tried the cause, and afterwards to the Court if the parties were dissatisfied with his opinion.

(2) So in an action of assumpsit brought on a foreign judgment recovered by the executor, the plaintiff may declare in his own right, and not as executor; *Crawford v. Whittal*, H. 13 G. 3. B. R. Dougl. 4. n.—So an executor may maintain an action in his own name against a sheriff for the escape of a prisoner who was in execution on a judgment obtained by him as executor; *Bonafous v. Walker*, 2 Durnf. & E. 126. (contrary to *Glover v. Kendal*, 1 Lutw. 893; *Reynell v. Langcastle*, Cro. Jac. 545; *Brookes v. Cooke*, 1 Show. 57; and *Wate v. Briggs*, 1 Ld. Raym. 35.)—So where an executor pays money which he was not obliged to pay, and afterwards brings an action to recover it back, he may declare in his own right; *Munt v. Stokes*, 4 Durnf. & E. 561.—And if an executor bring trover on a conversion in his own time, or assumpsit for money received after the testator's death, and fail, he is liable to pay costs though he name himself executor; *Atkey v. Heard*, Cro. Car. 219; *Anonymous*, 1 Ventr. 109; *Harris v. Hanna*, Rep. temp. Hardw. 204; *Goldthwayte v. Petrie*, 5 Durnf. & E. 234; and *Bellard v. Spencer*, 7 D. & E. 358., in which last case a contrary determination in *Cockerell v. Kynaston*, 4 D. & E. 277., was overruled.

own

own name and the goods appear to be the testator's; for in that case it is manifest that he cannot recover his own goods as executor, and fails in proving his cause of action which was to recover the goods as the goods of the testator.

But the true distinction, I think, is this, that where the thing sued for is assets in the hands of the executor or administrator before the recovery, or where the cause of action arises in the executor's own time and never did arise to the testator, there the executor may bring the action either in his own name or as executor. And this is laid down as law in the case of *Jenkins and his wife v. Plombe*, *Salk.* 207., but better and more fully reported in *6 Mod.* 92, 181. That was an action brought by the husband and wife as executrix upon an indebitatus assumpsit for money had and received by the defendant to their use as executrix: it is true that the judgment of the court was only that upon being nonsuited the plaintiffs ought to pay costs: but the reason of the judgment was because they might have brought the action in their own name and not as executrix; for wherever an executor may have the action in his own name he shall pay costs. And the case of *Eaves v. Mocato*, *Salk.* 314. was cited there, and this difference taken, that there were several counts by a plaintiff as executor one whereof was an *in simul computasset* and being nonsuited he paid no costs, because there was no *new cause* of action, but a new action ascertaining the ancient cause, which is still a debt of the testator's. And in the case of *Jenkins v. Plombe*, as appears from *Salkeld*, this distinction of *in simul computasset* is also taken; and it was said that if the defendant received this money by the appointment of the plaintiff, it was assets immediately, if without his consent yet the bringing of the action is such a consent that upon judgment it shall be assets immediately before execution, which otherwise it would not be until after execution; and the reason is because it is recovered against a person who never was indebted to the testator and the original debt was discharged.

To apply this to the present case; here is money received by the defendant since the testator's death, and therefore it could

not be received to the use of the testator, but must be received to the use of the executor. The executor has consented by bringing the action, and the money is assets immediately upon the judgment. It is quite a new debt created from the defendant to the executor since the death of the testator, and a new cause of action which was not subsisting before. The defendant was never indebted to the testator for this money, and the original debtors, the tenants, are discharged. No doubt had the action been brought against the tenants, it must have been brought against them by the plaintiff as executrix, because it was a debt as to them subsisting in the testator's lifetime and no new cause of action arising to the executrix.

It is said that, as this case of *Jenkins v. Plombe* is stated in *6 Modern*, *Powell J.* and *Gould J.* doubted: but whatever they might have done on the first argument, it is plain they were satisfied afterwards; for in page 182 it appears that the judgment was given *per totam curiam*.

It is said that the defendant had an authority by letter of attorney to receive the testator's rents, that this authority did not determine with the testator's death, and that therefore as the defendant received it by the authority of the testator it is money had and received to his use, and it shall not be presumed to have been received by the consent of the executor. But I think as this is a naked authority and not coupled with any interest it could not subsist after the testator's death. In *Combe's case*, *9 Rep.* 76. *b.* it was resolved that where a person has authority as an attorney to do an act, he must do it in the name of him who gave the authority; for he appoints the attorney to be in his place and represent his person; and for that reason the attorney cannot act in his own name, nor do it as his own act, but in the name and as the act of him who gave the authority. And if this be so, it is impossible to say that this defendant received this money as attorney for the testator or that he represented his person, in regard that the testator was dead; it is the executrix only who represents the person and stands in the place of the testator.

This has been likened to the case of an assignee of a bankrupt, of whom it is said

E c

that

1738.

SHIPMAN
against
THOMPSON.

1738.

SHIPMAN
against
THOMPSON.

that though the property of the bankrupt's goods or debts be vested in him, yet he must sue as assignee; and no doubt he must for all debts due to the bankrupt. But if goods be taken from the assignee, or money received from a debtor of the bankrupt after the assignment, I do not know that it has been any where adjudged that an action brought in his name would be ill. But be that as it will, this is the case of an executrix and not of an assignee of a bankrupt, and it was (I think) plainly and clearly adjudged in the case of *Jenkins v. Plombe* that an executor in such case may bring an action in his own name; and I do not find that it was ever adjudged to the contrary.

With regard to the case of *Chapman v. Darby*, *Carth. 232.*, where it was holden that, where the plaintiff brought assumpsit for so much money had and received to his use as administrator, the promise was not ill laid; no doubt it is so, and so allowed in *Jenkins v. Plombe* that the plaintiff may bring the action either way; so that this case of *Chapman v. Darby* does not prove that the administrator may not bring the action in his own name, but only that he may do it as administrator; and no doubt he may do it either way. As to the case of *Curry v. Stephenson*, *Carth. 335.*, *Holt Ch. J.* took exception to the declaration that it was not well, because the money was received after the death of the intestate, and then it was received to the use of the plaintiff generally, and not as administratrix; and the point was that though it was received by the defendant after the intestate's death, yet it

was before administration granted; and this is the reason on which the book seems to go why it was disallowed, which is not the present case.

As to the set-off; we cannot consider the convenience or the inconvenience on one side or the other, but must go according to the act; for the stat. 2 Geo. 2. c. 22. §. 13. says or if either party sues or is sued as executor or administrator where there are mutual debts between the testator or intestate and either party one debt may be set against the other; so that it is confined by the statute expressly to cases where the suit is as executor or administrator. And therefore in the present case the suit not being as executor, I think it is not within the statute, and that the debts due from the testator to the defendant cannot be set off against this plaintiff in an action brought by her in her own name and not as executor. And supposing this to be so, it was urged as one reason why the action here ought to have been brought by the plaintiff as executrix: but this statute will not alter the law as to that point from what it was before; and if the statute has not remedied all the inconveniences, we must take it as it is and cannot (I think) extend it farther.

So the postea must be delivered to the plaintiff, and she must have her judgment.—MS. Mr. Justice W. (then Mr. Baron) *Fortescue*.

To the above Mr. B. *Fortescue* afterwards added this note; "N.B. The Court of B. C. on a case made were of the same opinion as to both points (1)."

(1) The same point, relative to the set-off, has been since determined by the Court of King's Bench in two cases, *Kilvington v. Stevenson*, *East 1768* on demurrer; and *Tegetmeyer v. Lumley*, *Tr. 25 Geo. 3.*, on a motion for a new trial. *Vid. post.*—But a debt due to the defendant as surviving partner may be set off against a demand on him in his own right; *Slipper v. Slidstone*, 5 *Durnf. & E.* 493; & è converso a debt due from the plaintiff as surviving partner to the defendant may be set off against a debt due from the defendant to the plaintiff in his own right. *French v. Andrade*, 6 *D. & E.* 582.

1738.

CHRISTOPHER TREVETT *against* MARY AGGAS (a).Trin. 11 & 12
Geo. 2.
Wednesday,
June 21st.

DEBT on a bond given by the defendant to the plaintiff for 80*l.*, dated 24th of *June* 1727.

One deed may amount to a defeazance to another without express words of relation.

—A bond conditioned for payment of money on 25th of Dec.; a subsequent deed between the same parties, by which the obligor covenanted that if the obligee should pay on the 25th Dec. 5*s.* in the pound &c such payment should be accepted in full discharge and satisfaction of all sums due &c, and might be pleaded and given in evidence &c; the obligor (to an action on the bond) pleaded a tender and refusal of the 5*s.* in the pound on the 25th of December; and held good.

—In pleading a tender of a sum of money ac-

The defendant craved oyer of the condition, which was for the payment of 4*l.* on the 25th of *December* next after the date. And then pleaded that after the sealing and delivery of the bond and before the suing out of the original writ, *ss.* on the 12th of *March* 1729 the defendant paid to the plaintiff all the money then due on the bond, except 40*l.*, when the plaintiff by his deed in writing sealed &c for himself his heirs executors &c covenanted promised and granted to and with the defendant her executors &c that if the defendant &c should pay to the plaintiff &c *five shillings for every twenty shillings due* from the former to the latter, and so at the same rate for every greater or less sum than 20*s.*, *on or before the 25th of December* next ensuing the date of that deed, the plaintiff &c would accept the same in full discharge and satisfaction of all such money as then was or on the said 25th of *December* should be due from the defendant to the plaintiff &c; and that from and after payment of the said sum of 5*s.* in the pound &c according to the true intent and meaning of the said deed the same deed should be a sufficient release acquittance and discharge to the defendant &c to be pleaded and given in evidence in any court of law or equity *for such sum as then was or on the said 25th of December should be due* from the defendant to the plaintiff. That on the said 12th of *March* the defendant was not indebted to the plaintiff in any sum, save only the said sum of 40*l.* *That on the 24th of December* next ensuing the date of the said deed and before the suing out of the original writ *the defendant was ready and offered to pay*

according to a defeazance (which is in a different instrument from the original deed) it is not necessary either to plead that the party has always been and still is ready to pay, or to bring the money into court: it is sufficient to plead that on the day he tendered &c.

—Aliter, if the defeazance be in the same deed.

(a) This case is reported in *Com.* by the name of *Trevet v. Angus*, *Com. Rep.* 568.

1738.

TREVETT
against
AGGAS.

to the plaintiff the sum of 10*l.*, being the sum of 5*s.* in the pound due and owing on the said 12th of March 1729 to the plaintiff from the defendant according to and in pursuance of the said deed, which said sum of 10*l.* the plaintiff then and there refused to accept &c.

To this plea the plaintiff demurred, and shewed for causes that the defendant had not alleged in her plea that she had always been ready from the time of the supposed tender mentioned in the plea to pay the said 10*l.* to the plaintiff, or that she had brought the said 10*l.* into court; and that the plea was not issuable &c.

The defendant joined in demurrer.

This case was twice argued; the first time on *Friday February 3d 1737* by *Eyre* Serjt. for the plaintiff, and by *Burnett* Serjt. for the defendant; and the second time on *Thursday June 16th 1737* by *Wright* Serjt. for the plaintiff and *Prime* King's Serjt. for the defendant; and the judgment of the Court was this day given as follows by

Willes, Lord Ch. Just. "Four objections were made on the part of the plaintiff to this plea;

1st, That the deed of the 12th of *March 1729* does not amount to a defeazance, and cannot be pleaded as such.

2dly, That, if it could, it does not appear to relate to the bond in question.

3dly, That, if it did, the defendant has not tendered 5*s.* in the pound for what was due on the 24th of *December 1730*, which he ought to have done by the express words of the agreement.

4thly, Which is the only reason that is insisted on as a cause of demurrer, that she has not pleaded that she has always been ready to pay the 10*l.* according to her tender, nor brought the same into court.

As to the first objection: We are of opinion that this deed may be insisted on as a defeazance, and that there are words in it which sufficiently shew it to be so within the rules that have been laid down in all the cases that have been cited in respect to this part of the case. It is said that the money, when paid, shall be accepted and taken by the plaintiff in full discharge and

satisfaction of all sums of money that were or should become due to him on the day therein mentioned; and that on the payment thereof the said deed should be a sufficient release acquittance and discharge to the said *Mary Aggas* her executors &c, to be pleaded and given in evidence in any court of law or equity for all such sums as were then or on the said 25th of *December* should be due or owing to the said *Christopher* &c from the said *Mary* &c. We are therefore all of opinion that this is more than a covenant, and that it may be insisted on as a defeazance (a); and wherever it can, we think that it ought, to avoid circuity of actions which the law always abhors (b).

1738.
TREVETT
against
AGGAS.

As to the second objection, that it does not relate to the bond, we think that to a common intent (and pleas are good if good to a common intent) it must be construed to relate to it. For it does not appear that there were any other transactions between the plaintiff and the defendant, or any other sum due from the defendant to the plaintiff but the money due on the bond. If there had, we think that the plaintiff ought to have shewn it in his replication. And even in the case of lands, which is much stronger than this, and in the case of the execution of a power which is to be more strictly construed than any other case whatsoever, it has been holden that words of relation &c are not necessary. So in *Scroope's* case 10 Co. 143, 4, and in many other cases, it has been adjudged that a deed may be construed as the execution of a power, though it does not refer at all to or take any notice of the deed in which the power is. Besides in the present case it is expressly averred in the plea that the de-

(a) Vid. *Hodges v. Smith*, Cro. Eliz. 623.—If the obligee covenant (by a subsequent deed) not to put the bond in force at any time, the covenant may be pleaded in bar to an action on the bond, as a release: but if he only covenant not to put the bond in force for a certain limited time, it cannot be pleaded in bar, but the obligor must resort to an action on the covenant. *Ayliffe v. Scrimshire*, Carth. 64; 1 Show. 46.—But where the obligor assigned over his interest in a house to the obligee in trust to sell and pay himself and the rest of the creditors, who all covenanted on receipt

of the produce of the sale in proportion to their debts to give a general release to the obligor, and not to sue the obligor in the mean time, it was holden that this covenant operated as a defeazance and might be pleaded in bar to an action on the bond. *Carvell v. Edwards*, Carth. 210, and 1 Show. 330. See the cases on this subject collected in *Dean v. Newhall*, 8 Durnf. & East. 168.

(b) Vid. *Powell v. Forrest*, 2 Saund. 48.—But see also *Clayton v. Kynaston*, Salk. 573; and *Lacy v. Kynaston*, ib. 575. 1 Ld. Raym. 668; and 12 Mod. 548.

F f

fendant

1738.

TREVETT
against
AGGAS.

defendant owed the plaintiff at the time of this deed no other sum than the said sum of 40*l.*; and if so, it must relate to it.

Thirdly; As to the defendant's having only tendered 5*s.* in the pound for what was due at the time of the date of the deed, and not 5*s.* in the pound for what should be due on the 24th of *December*, the time of the tender, which was 7*s.* 6*d.* more, there being then 30*s.* more due for three quarters of a year's interest on the bond, we think that the agreement did not oblige her to it. For the agreement is that she shall pay 5*s.* in the pound for every twenty shillings *due*, which must be construed to mean the same as *now due*, or *due at the time of the agreement*. The 25th of *December* is only mentioned afterwards as the time given for the payment of the money. And though it is said that such sum shall be a discharge of what should be due on the 25th of *December*, we think that will not alter the case; for the sum which is to be taken in discharge is the sum before mentioned, which is only 5*s.* in the pound for what was due at the time of the agreement.

Fourthly; As to the last objection, which is the only one that is insisted on as a cause of demurrer in the pleadings, we are of opinion that the pleading of a tender and refusal in this case is sufficient, and that it was not necessary for her either to bring the money into court or to say that she always was and is still ready to pay it; it being a sum collateral to the sum in the defeazance, and though a lesser sum than that it is not to be considered as part of it.

There are several cases express to this point. In *Co. Lit.* 207. it is expressly laid down in the case of a mortgage, that if the mortgage-money be once tendered and refused the mortgagee is without remedy, because the money is collateral to the lands. And it is said also that if a man be bound by bond or recognizance, and afterwards the obligee or conusee signs a defeazance for the payment of a lesser sum at a day, if the obligor or conusor tender such lesser sum at the time and the obligee or conusee refuse to accept it, he is without remedy, and the conusor or obligor is not obliged in pleading to say "that he is still ready

to pay the same," or to tender it in court, which is exactly the same case as the present. In that case there was the same reason to say that the lesser sum was part of the greater sum as in this case. The same is expressly laid down as law in 9 Co. 79. b. in the argument in *Peyton's* case, and there said to have been so determined in 33 Hen. 6. fo. 2. The same is likewise so expressly determined in the case of *Cotton v. Sir G. Clifton*, Cro. Eliz. 755, but held there that it would be otherwise if the bond and defeazance were in the same deed (a). The same likewise is laid down as undoubted law in *Moor* 36. pl. 119. And I can find no one case to the contrary. So that I take this point to be so clearly settled that there is no occasion to cite any more cases or to say any more upon it.

1738.
TREVETT
against
AGGAS.

We are therefore all of opinion that there is no weight in any of the plaintiff's objections to the defendant's plea, and consequently that judgment must be for the defendant."

(a) Bro. Abr. "Tout temps prist." pl. 1 & 2. S. P.

The Mayor and Burgeſſes of the Town of NOTTINGHAM against RICHARD LAMBERT.

M. 12 G. 2.
Saturday,
Nov. 25th.

THE following opinion of the Court was thus delivered by

Willes Lord Chief Justice. "Case. This case comes before the Court on a special verdict found at the assizes held for the county of Nottingham on Thursday the 28th of July 1736.

The plaintiffs declare that the town of Nottingham has been time out of mind a town corporate, called by several names according to the several charters in the declaration set forth; and that by their last charter 19th October 4 W. & M. they were incorporated and are still stiled by the name of the Mayor and Burgeſſes of the town of Nottingham, which was made a county of itself by the charter 15th September 28 Hen. 6. That the manor

A prescription to take a toll for passing on an ancient navigable river through the plaintiff's manor is bad in law.
—A prescription for toll thorough cannot be supported in law, unless a consideration be shewn for it.

—Aliter of a toll traverse, where a consideration is implied.

—Assumpsit for a duty in which the plaintiff claims an inheritance.

F f 2

of

1738.
The Mayor,
&c. of Not-
TINGHAM
against
LAMBERT.

of *Nottingham* is an ancient manor, and that time out of mind till the 15th of *September* 28 *Hen.* 6. it was parcel of the county of *Nottingham*, and from that time and still is within the county of the town of *Nottingham*. That the river *Trent* in and throughout the said manor is and time out of mind hath been an ancient navigable river; and that the mayor and burgeses of *Nottingham* and all their predecessors by their several names have time out of mind had and received and used and ought of right to have and receive by their ministers and servants a certain duty or toll of every master or navigator of every boat barge or other vessel laden with goods wares and merchandizes navigated on the said river *Trent* through the manor aforesaid (the said master or navigator being a foreigner and not a burges or a freeman of the said town) viz. 2d. a ton for every ton of goods loaden and being upon any vessel so navigated as aforesaid.

They then set forth that the defendant at the time when &c was not a freeman or burges but a foreigner, and that he on the 4th of *September* 1735 was master or navigator of a vessel in which four tons of goods were loaded, and which vessel on the same day was navigated by him on the said river *Trent* through the said manor of *Nottingham*, whereby he became indebted to the plaintiffs in 8d., being 2d. for every ton so navigated, and that being so indebted he promised to pay the same to the plaintiffs, but that he hath not paid the same.

The plaintiffs likewise further declare for a toll for passing through a bridge. There is likewise a general count for the duty demanded in the first. But upon these two last counts there is a general verdict for the defendant, on the general issue pleaded; so that they are now quite out of the case.

And the question only arises on the 1st count, to which the defendant likewise pleaded the general issue that he made no such promise; and upon that the jury found a special verdict.

And they find that the town of *Nottingham* was an ancient town, and that it was incorporated by the several names and by such charters as are set forth in the declaration, and that it was erected into a county of itself by the charter 28 *H.* 6. They find likewise

likewise that the manor of *Nottingham* is an ancient manor, and that time out of mind till the 15th September 28 H. 6. it was parcel of the county of *Nottingham*, and from that time till now was and is within the county of the town of *Nottingham*. They further find that the river *Trent* in and throughout the said manor is and hath been time out of mind an ancient navigable river, and did anciently run and doth now run through the said manor of *Nottingham*; and that the mayor and burgeses of *Nottingham* and their predecessors by their several names of incorporation have time out of mind had and received and have used to have and receive by their ministers and servants a certain duty or toll of every master or navigator of every boat barge or other vessel laden with goods navigated on the said river *Trent* through the said manor (the said master or navigator being a foreigner and not a burges or freeman,) viz. 2d. a ton for every ton of goods loaden and being upon every such vessel navigating and passing on the said river through the said manor. And they further find that there was not any consideration proved to them at the trial for the payment of the said duty or toll.

They further find that that part of the said river which runs through the said manor and on which the defendant navigated his said vessel is between a certain town or place called or known by the name of *Gainsborough* in the county of *Lincoln* and a certain place called *Wilden Ferry* in the county of *Derby*, both mentioned in a certain act of parliament thereafter found. And they find that there was an act of parliament made at a sessions holden on the 6th of December 1698, intituled "An act for making and keeping the river *Trent* in the counties of *Leicester*, *Derby*, and *Stafford*, navigable," and that the same is yet in full force and unrepealed (though there was no occasion for finding this, it being a public act).

They also find the fact that the defendant on the 4th of September 1735 was master or navigator of a vessel on which four tons of goods were loaded, and that the same was navigated by the defendant on that day on the said river *Trent* through the said manor of *Nottingham*; and that the defendant hath not paid to the plaintiff 2d. a ton for so doing. They likewise find that the defendant is not nor was on the said 4th of September nor at any other time before or since a burges or freeman of the said town of *Nottingham*, but is and was a foreigner.

G g

And

1738.

The Mayor
&c of NOT-
TINGHAM
against
LAMBERT.

1738.

The Mayor
&c of NOT-
TINGHAM
against
LAMBERT.

And they conclude, as usual, and submit the matters of law to the judgment of the Court.

Upon the arguing (a) of this special verdict three questions were made, which, though the plaintiffs began, will most properly come by way of objections on the part of the defendant.

First, it was objected that an action on the case would not lie for a duty, in which the plaintiffs claimed an inheritance.

Secondly, That the prescription itself, as declared upon and found in this special verdict, is not a legal prescription, but void in law.

Thirdly, That though the prescription be taken to be good, and that the plaintiffs might have been entitled to this duty before the making of the statute 10 & 11 W. 3., yet that they are not now entitled to it, it being by that statute enacted that all his Majesty's subjects should have a free passage for navigating on the said river without any obstruction whatsoever, and there being no saving therein for the mayor and burgeses of *Nottingham*.

I shall begin with the second objection, because if that prevail there will be no occasion to say any thing upon either of the two others. And we are all of opinion that this is a good objection, and that the prescription as laid and found is not a good and legal prescription.

It is said that the river *Trent* in and throughout the said manor hath been time out of mind a navigable river, and consequently every subject of *England* hath always had a right to navigate on this river as much as he has to travel on the common highway. And as the toll is demanded for nothing else but navigating on the river *Trent*, it must be considered as *toll thorough*; and a difference has always been taken between *toll thorough* and *toll traverse*. It has been holden several times, and by the best authorities, that toll thorough cannot be supported without a consideration, but toll traverse may, because it in itself implies a consideration. In the book of assize 22 Ed. 3. 58. it is expressly laid down as a rule that toll thorough is against

(a) It appears that this verdict was twice argued; once on the 8th of June 1738 by *Eyre King's* Serjt. for the plaintiffs, and *Parker King's* Serjt. for the defendant, and again on Saturday, Nov. 11th by *Belfield* Serjt. for the former and *Skinner King's* Serjt. for the latter.

common

common law and common right, and cannot be supported by usage. It is so likewise holden in *Keilw.* 148, 9. that such toll is not allowable without some particular consideration. It is said in 1 *Leon.* 232. that the King cannot grant toll thorough for passing through a highway, for that it is an oppression to the people, for that every highway shall be common to every one. In 1 *Vent.* 71., in the case of the city of *Norwich*, such custom was holden to be illegal and unreasonable unless for such vessels as unloaded at the quay there. In several books it is called *malum tolnetum*, or an outrageous toll, and an oppression on all the subjects of *England*, which sorts of tolls are condemned in *Magna Charta*, c. 30., and by statute *Westm.* 1. (a), c. 31., where it is said that if any one take outrageous tolls contrary to the common law of the realm, if it be in a vill of the King's, the King shall take away the franchise.

1738.
The Mayor
&c of NOT-
TINGHAM
against
LAMBERT.

And this distinction is supported by reason as well as authority. For how can a duty be imposed on all the subjects of *England* only for enjoying that privilege which is their inherent birthright, and which every subject had a right to before? If indeed they receive any particular benefit, as going over a bridge, coming into a quay, wharf, port (b), or the like, this indeed may alter the case: but then this must be particularly shewn.

Some cases have been cited to the contrary; but when looked into they either stand on some particular reason which plainly distinguishes them from the common case, or it is only said obiter that such tolls may be supported by prescription without any consideration: but the reasons given for it are such as make such dicta of no weight or authority. In the case of 21 *Hen.* 7. fo. 16., the first case that was cited to this purpose, this point was not at all considered, but other objections were taken to the declaration without taking any notice of this; so that it is no authority at all. The case of *Smith and Shepheard*, which was principally relied on on the part of the plaintiffs, as it is reported in *Cro. Eliz.* 711., is very imperfectly stated: but if that report deserve

(a) 3 *Edw.* 1. c. 31.

(b) In the Mayor of *Yarmouth* v. *Eaton*, 3 *Burr.* 1402. where the plaintiff claimed a prescriptive right to a duty or

toll, called *measurage*, for goods exported from the port of *Yarmouth*, the Court said that the claim implied a consideration.

any

1738.
The Mayor
&c of NOT-
TINGHAM
against
LAMBERT.

any credit, the Judges there were very much divided, and they did not give any final judgment on this point. And as the case is reported in *Moor* 574., and much better than in *Croke*, it is an express authority against this toll. For it is there said that this toll which was insisted on by the defendant in his plea was adjudged to be bad, for that a man cannot prescribe to have toll for passing in the King's highway (a), for that it is the inheritance of every man to pass on the King's highway, which is prior to all prescriptions; and that therefore if a man will plead such a prescription he must shew a reasonable cause for its commencement which is not to be presumed.

It is said indeed in some books, and particularly in the case of *James and Johnson*, 1 *Mod.* 232., that if the prescription be found (as it is in the present case,) it must be presumed to have a reasonable commencement: but this is laid down generally without consideration and without distinguishing the nature of the case. For though this may be true sometimes in the case of a private right, it is plainly otherwise in the case of a public right, to which all the subjects of *England* are entitled. For if a reasonable commencement be presumed, it must be that it began by agreement, and that such agreement being so long ago cannot now be proved; which may be well enough in the case of a private right. But who could agree for all the subjects in *England*? They cannot consent to part with their rights, nor can they be deprived of their rights, any otherwise than by act of parliament, in which the consent of every one is implied. This distinction is obvious and founded on good sense.

In several of the cases cited there is a particular benefit to the subject, as coming into a wharf, coming into a port, or landing on the plaintiff's manor or quay, which distinguishes it from toll thorough. So are the cases 1 *Mod.* 47, 8; 3 *Lev.* 37, and

(a) Accordingly it has since been ruled that a prescription to take toll for passing through the streets of *Gainsborough*, in consideration of repairing "divers and many streets in the town of G.", is bad, because that was no consideration for taking toll in the streets not so repaired. *Truman v. Walgham*, 2 *Wils.* 296.—But where the plaintiff, claiming a toll for passing over an highway, shewed that the liberty of passing over the soil and taking

the toll for such passage were both immemorial, and that the soil and the toll were before the time of legal memory in the same hands though severed since, it was presumed that the soil was originally granted to the public in consideration of the toll, and held that such original grant was a sufficient consideration to support the claim to the toll. *Lord Pelham v. Pickersgill*, 1 *Durnf. & E.* 660.

424 (a), and several other cases which were cited. And there is a further reason to be given for the determination in 3 *Lev.* 37. that the duty there was claimed by the city of *London*, whose customs and franchises are all confirmed by act of parliament. In the case of *Wilkes v. Kirby* (b), *P.* 12 *W.* 3. the duty was expressly laid to be paid erga reparationem pontus. It is best therefore to adhere to the old rule, which is founded upon the best reason, that toll thorough cannot be maintained without a particular consideration shewn.

It was said indeed in the present case that it is not found that there was no consideration, but only that there was no consideration proved: but de non apparentibus et de non existentibus eadem est ratio. Besides this negative need not have been found (c) at all; for though of late years such negatives have been sometimes found, no such negatives were ever found in old special verdicts, except where it was necessary to shew that the person or thing did not come within a particular exception; as in the present case it was proper to find that the defendant was not a burgess or freeman; otherwise what was not found was always taken not to be proved. However this finding, that no consideration was proved, makes the case still stronger, and excludes any presumption of a consideration. Besides the present case is stronger against the plaintiffs than any that has been before; for it is not either laid or found that the plaintiffs are lords of the manor or owners of the soil or the water; so that for any thing that appears on the record before us, another person may be lord of the manor and owner of the soil and water. So that there is not only no room to imply any consideration for this toll, but the consequence might be, if it should be established, that the lord of the manor or the owner of the soil or water (if not a burgess or freeman of *Nottingham*) might be obliged to pay a toll to mere strangers for navigating in his own manor, soil, or water, which would be most unreasonable and absurd.

For these reasons we are all clearly of opinion that this prescription cannot be supported.

(a) The same question has since received a similar determination on this claim. *Colton v. Smith*, *Cowp.* 47.

(b) 2 *Lutw.* 1519.

(c) See *Marten v. Jenkin*, 2 *Str.* 1144; and 1 *Will.* 57.

H h

It

1738.

The Mayor
&c of NOT-
TINGHAM
against
LAMBERT.

1738.
The Mayor
&c of NOT-
TINGHAM
against
LAMBERT.

It is therefore unnecessary to say any thing on the two other objections. The last on the act of parliament may be a question of great consequence and extent, as there are so many acts of parliament drawn in the like manner for making rivers navigable; and it will be time enough to give our opinions on it when it becomes a necessary question.

Nor need we say any thing on the first objection, that an action on the case will not lie for a duty, in which the plaintiffs claim an inheritance. I will only say thus much upon it, that though this might have been a doubt formerly, yet so many of these actions have been brought, and so many like actions in cases of the like nature, where it was formerly holden that an assize only lay or an action of debt, that it seems to be now too late to insist on this objection (a).

But there is no occasion for entering more minutely into it, we being all of opinion that, for the second objection, judgment must be for the defendant."

(a) A general indebitatus assumpsit will lie for tolls; the Mayor &c of *Exeter v. Trimlet*, 2 *Will.* 95; and *Seward v. Baker*; 1 *D. & E.* 616;—or for fines due to the lord on the admission of a copyholder; the Duke of *Devonshire v. Cradock*, *H.*

27 *Geo. 2. C. B.*; *Evelyn v. Chichester*; 3 *Burr.* 1717; *Grant v. Affle*, *Dougl.* 722; and *Whitfield v. Hunt*; *ib.* in note 727;—or for the profits of an office; *Boyer v. Dodsworth*; 6 *D. & E.* 681.

M. 12 G. 2.
Saturday,
Nov. 25th.

THOMAS KETTLE *against* THOMAS BROMSALL.

[T. 11 & 12 GEO. 2. Rol. 1697.]

Trover and detinue cannot be joined in the same action.

—A declaration in detinue should state a request on the defendant by the plaintiff to deliver &c.

—Detinue will lie for goods lost

and found as well as for goods delivered &c.

—If goods be delivered by A. to B. *to keep safely*, B. is answerable for them to A., though he be robbed of them—*Secus* if they be delivered to B. *to keep as his own goods* &c.

WILLES Lord Chief Justice gave the opinion of the Court as follows;

"Detinue. The plaintiff declares in the first count that he was possessed of a handle of a knife with an old *English* inscription purporting it to be a deed of gift to the monastery of *St. Albans*, a ring with an antique stone with one of the *Cæsars'* heads upon it in basso relievo, and of several other things of the like nature, particularly specified in the declaration, and laid to-

gether

gether to be of the value of 500 *l.* as of his own proper goods; and that being so possessed he casually lost the same, and that afterwards by finding they came unto the hands and possession of the defendant, by reason whereof an action accrued to the plaintiff to demand the same of the defendant.

In the second count he declares that he delivered to the defendant the same things, specifying them again, of the value together of 500 *l.* to be *safely kept* and to be delivered to the plaintiff when required; that nevertheless the defendant, though often requested, has not delivered the same or any part thereof to the plaintiff, but refused and still doth refuse to deliver the same and unjustly detains them; to the plaintiff's damage 1000 *l.*

The defendant pleads that the plaintiff delivered to him the said goods and chattels *to take care of them as his own* proper goods, and to shew them to any person or persons to know the value of them; and that the defendant, having the said goods and chattels in his pocket to shew them to such persons as were likely to tell him the value of the same, the said goods and chattels were feloniously taken from him by some person unknown to him without his wilful default or privity; and this he is ready to verify, therefore he prays judgment whether &c.

The plaintiff replies that he did not deliver to the defendant the said chattels in the declaration mentioned to take care of them as his own proper chattels, or to shew them to any person or persons to know the value of them, as the defendant by his said plea hath alleged; and concludes to the country.

The defendant demurs; and for causes of demurrer shews that the plaintiff doth not by his replication fully answer to the matter in bar above pleaded, and that the said replication concludes to issue when it ought to have concluded with an averment, and thereby have given the defendant an opportunity to rejoin, and to have put the whole matter in issue in a direct affirmative and negative.

The plaintiff joins in demurrer.

Serjt. Comyns for the defendant took three objections (a); two to the declaration, and one to the replication.

(a) The case was argued November 8th, 1738, by Comyns Serjt. in support of the demurrer, and by Agar Serjt. contra.

1738.

KETTLE
against
BROMSALL.

1st, That the writ is for 1000 *l.* and the goods are laid in the declaration to be but of the value 500 *l.* But there is not the least colour for this objection; for there are two counts, and the goods in each are laid to be of the value of 500 *l.* and the damage at 1000 *l.*

2dly, That the first count is in trover, and the second in detinue; and that trover and detinue cannot be joined. That if the first be taken to be in trover, there is no conversion; and if in detinue, there is no demand; and consequently that it cannot be good in either. To shew that trover and detinue cannot be joined he cited 8 Co. 87. *b.* *Buckmere's* case; because they require different pleas (a).

But we are all of opinion that this objection will not hold; for that both counts are in detinue. Detinue will lie for things lost and found as well as for things delivered; so it is expressly laid down in *Fitz. N. B.* tit. "*Detinue*" (E), a book of the greatest authority (b). It was so also held as long ago as the 27 (c) and 34 *Hen.* 8. and there are several cases to the same purport in *Gliffon* and *Gulston*, tit. "*Detinue*"; a book of good credit. There are likewise several precedents of this sort in *Townsend's* Tables, tit. "*Detinue*"; a book of very good authority. And it would be very absurd if it were otherwise; for if so, a person might be greatly injured, and have no adequate remedy. For in trover only damages can be recovered; but the things lost may be of that sort, as medals, pictures, or other pieces of antiquity, (and this seems to be the present case,) that no damages can be an adequate satisfaction, but the party may desire to recover the things themselves, which can only be done in detinue.

So that taking it for granted (which I believe is so) that trover and detinue cannot be joined, yet this objection will be of no weight in the present case; and this likewise will answer the other part of the objection; for though there be no request or conversion laid in the first count, yet there is a request laid in

(a) Not only the *pleas*, but the *judgments* also, are different: in trover only damages can be recovered, but in detinue the things themselves, or their value, may be recovered. And two counts cannot be joined in the same declaration, unless

the same judgment may be given on both. *Brown v. Dixon*, 1 *Durnf. & E.* 276.

See also *Gilb. Hist. C. B.* 6, 7.

(b) *Fitz. N. B.* 304.—*Vid. Co. Lit.* 286. *b.* accord.

(c) 27 *Hen.* 8. 13.

the last count, and if one of the counts be good, the general demurrer to both will not hold.

Thirdly, The last objection is to the replication, which as assigned as a cause of demurrer is scarcely intelligible; and we are of opinion also that this is of no weight. When a fact is pleaded, the plaintiff may certainly deny it and join issue upon it. He must indeed join issue on a material part of the plea; and so he has done here, for he has joined issue on the only part of it that is material. For according to *Southcote's* case, 4 Co. 83, 84., the case of *Coggs v. Barnard* (a), and several other cases, if the goods were delivered to be kept safely, though the defendant had been robbed of them, detinue will lie against him; for he must take his remedy against the thief or the hundred as he can. But if the goods were delivered to the defendant to take care of them as his own proper goods (b) &c., if he be robbed of them, that is a good plea. The only material part therefore of this plea is whether the goods in the declaration were delivered to the defendant only to take care of them as his own &c; and this fact the plaintiff hath traversed.

As therefore we are of opinion that the objections would not hold either to the declaration or the replication, judgment was given for the plaintiff."

(a) 2 *Ld. Raym.* 909; *Com. Rep.* 133; *Salk.* 26; in which part of the doctrine in *Southcote's* case was denied to be law.

(b) Though even in such case the de-

fendant is answerable for damage or losses arising from his gross negligence; *Mytton v. Cork*, 2 *Str.* 1099.

1738.

KETTLE
against
BROMSALL.

1738.

M. 12 G. 2.
Tuesday,
Nov. 28th.RICHARD MORSE *against* GEORGE JAMES, WILLIAM
SYMONDS, PHILIP ELLY and CHRISTOPHER CAR-
TER (a).

An officer of
an inferior
court may
justify acting
under pro-
cess which is
only void-
able, but not
under void
process.

—Errors in
process in in-
ferior courts
cannot be
amended un-
der stat.
8 Hen. 6.
c. 12, and
15.

—Officers
justified un-
der a precept
stated to
bear date
26th Febru-
ary issuing
out of a
court held

24th February; held that the process was void, and the justification bad.

—A sheriff, who justifies under a returnable writ, must shew it returned, though his bailiffs need not.

—Whether it be not necessary for the officer of an inferior court, to whom its precepts are directed, to shew a precept, under which he justifies, returned? Qu.

—If in such case he do not, but rely merely on the precept itself, whether it be necessary for him to conclude the plea *prout patet per recordum*? Qu.

—But if he do shew the return as well as the precept, the plea must so conclude.

—When an officer of an inferior court justifies under a precept to take the goods of A. B. in execution, the precept and return are not merely inducement but of the substance of the justification.

—Though an officer is justified in acting under erroneous process, it must be in a case where the court, out of which it issued, had jurisdiction.

—Defendant justified as an officer of an inferior court for trying &c causes touching mines and miners within a certain district; the plea was holden bad because it did not allege that the defendant below was a miner "at the commencement of the suit below" but only "when the execution issued."

—If the plaintiff in an action in an inferior court, or a mere stranger, justify under process, he must set forth the proceedings at length, otherwise the plea is bad not only as it respects him but the officers of the court also who join with him in the plea.

—Whether a person, who acts at the request of the officers and in their aid, in executing *civil* process of an inferior court, be such a stranger? Qu.

—Plea of justification under the process of an inferior court holden "at the forest of D." which contains many thousand acres, without stating in what particular part of the forest, good; *semb.*

(a) 7 Mod. 245. oct. ed. S. C.—This is said, in the Prothonotary's Docquet Roll, to be entered Hil. 11 Geo. 2. Roll 318, and 319; but on searching it appears that the Roll was never carried in. The transcript of the record is however in Tr. 13 & 14 Geo. 2. Rol. 34. B. R.

accruing and happening within the said forest and jurisdiction of the same court and touching the mines and miners thereof there held and to be held in the said forest on *Tuesday* in every fortnight. That the court is and time out of mind hath been held before the constable of the castle of *St. Briavell's* in the said county or his deputy or deputies; and that before the time when &c. at a court of record of our said lord the King held at the said *Forest of Dean* in the county aforesaid within the jurisdiction of the said court according to the custom of the said court time out of mind used and approved on *Tuesday the 24th of Februray 1735*, before *Thomas Pyrke* Esquire deputy to *Earl Berkeley* constable of the said castle and then steward of the said court, there issued out of the said court a certain precept under the seal of the said court bearing date *26th of February* in the same year, directed to the deputy gaveller of the mines of his Majesty's said *Forest of Dean* and also to the said *Philip* (he the said *George* then and there and until the return of the said process being deputy gaveller of the said mines and an officer of the said court for that purpose, and the said *Philip* being also then and there and until the return of the said process an officer of the said court for this purpose,) by which precept the said *George* and *Philip* were commanded to levy of the goods of the plaintiff then one of the said miners, if the goods should be found within the liberties of the said mines and jurisdiction of the said court, the sum of *25 l.* for a debt which the said *William Symonds* then one of the said miners recovered against him by judgment of the same court in a plea of debt, being for a cause of action arising within the jurisdiction of the same court, and that they should have the said *25 l.* at the then next court to satisfy the said debt; which said precept before the return, namely, on the *2d March 1735*, was by the said *William Symonds* delivered to the said *George* and *Philip* to be by them executed in due form of law; by virtue of which precept the said *George* and *Philip* as officers of the said court, and the said *Christopher* as their servant, and at their request and in their aid and assistance, afterwards and before the return thereof, viz. on the said *2d of March 1735* at *Yorkly* within the jurisdiction of the said court took drove and led away the said six oxen and four mares there in execution for the debt aforesaid, and detained them for two days and until they had levied the said *25 l.* so recovered; as it was
lawful

1738.

MORSE
against
JAMES.

1738.

MORSE
against
JAMES.

lawful &c. and the said *George* and *Philip* at the return of the said precept viz. at a court held before the said *Thomas Pyrke* on *Tuesday 9th March 1735* returned the said precept in all things duly served and executed; which is the same taking &c; and this they are ready to verify; wherefore they pray judgment if &c.

The defendant *Symonds* likewise pleads a special justification under the same process, and sets forth the plaint and all the proceedings particularly, only he does not set forth the return of the precept, and concludes as the others.

The plaintiff impairs, and before the day given, namely, the 17th of *December 1736*, the defendant *William Symonds* died, which is suggested on the record and admitted by the plaintiff; so the proceedings against him are ordered to stay, and his plea is quite out of the case.

After several other imparlances the plaintiff demurs to the plea of the three other defendants, and for causes of demurrer shews that the said plea is repugnant and inconsistent in alleging that the precept therein set forth issued out of the court therein mentioned on a different day from that on which it bears date; and, for that the said *George Philip* and *Christopher* have not set forth or alleged in their said plea that the precept mentioned to issue out of the said court or the return thereof was or is recorded in the said court, or that it appears by any record of the said court that such precept did issue thereout or that such return was made thereto, and for that the said defendants have not by their said plea referred to the record of the precept and return, or verified the said plea by such record, and that the said plea is uncertain &c. The said three defendants join in demurrer.

And upon the arguing (a) of this demurrer there were several objections taken to this plea by the plaintiff.

1st, That the precept is alleged to bear testè on the 26th of *February* and to be issuing out of a court held the 24th, and no court could be holden on the 26th; that it was therefore a void

(a) This case was twice argued; the first time in *Easter term 1738* by *Parker* King's Serjt. for the plaintiff, and *Draper* Serjt. for the defendants, and the second time by *Eyre* King's Serjt. for the former and *Wright* Serjt. for the latter on a prior day in this term.

precept, and consequently even the officers of the court could not justify under it.

2dly, That they ought to have concluded their plea *prout patet per recordum*. That this is necessary as to the precept itself; but if not, certainly so as to the return.

3dly, That it does not appear that this precept issued in a cause wherein the court had a jurisdiction.

4thly, That *Christopher Carter* being a stranger, and not an officer of the court, ought to have set forth the proceedings at large; and that if the plea is bad as to him, the other two defendants having joined in the plea along with him their plea likewise must be bad.

5thly, That it ought to have been shewn at what place in particular the court was held; and that saying it was held in the forest, which contains at least 30,000 acres, is not sufficient.

As to the first objection; it depends entirely on this, whether the precept were void or only voidable; if voidable, the officers might justify under it; if void, they could not. It was certainly void, if it be not amendable. The question therefore is, Whether amendable or not? If it be amendable, it must be so by the stat. 8 H. 6. c. 12. and 15. And for this purpose the counsel for the defendants cited several cases: but the words of these statutes plainly do not extend to inferior courts. For they only say *the King's Judges*, and *the King's Justices*, may amend; which words have always been construed not to include the Judges of these inferior courts. The cases cited out of *Cro. Jac. (a)*, *Cro. Car. (b)*, *Sir T. Jones (c)*, and several other books, are all of amendments by the courts of *Westminster-Hall*, and there was no case cited, nor can I find any, of such amendments made by inferior courts (*d*). We are therefore of opinion that this is a fatal objection.

As

(a) Vid. *Dolphin v. Clerk*, *Cro. Jac.* 64; and *Comyn v. Kyneto*, *ib.* 162.

(b) Vid. *Aylesworth v. Chadwell*, *Cro. Car.* 38.

(c) Vid. *Smith v. Harward*, *Sir T. Jon.* 41.

(d) There seems to be some confusion in the books respecting the operation of these two statutes and the other statutes

of amendment and jeofails.—There is evidently a distinction in the penning of the different statutes on this subject; some speaking of the superior courts, others extending to inferior courts of record. The statutes 8 Hen. 6. c. 12. and c. 15, speak of "The King's Judges", "The King's Justices", and "The said Courts (1) of the King". The stat.

(1) Which mean the superior courts at *Westminster*. *Dyer* 236, a; *Moor* 599; and *Styles* 340.

1738.

MORSE
against
JAMES.

1738.

MORSE
against
JAMES.

As to the second objection, that the defendants do not conclude their plea prout patet per recordum. Considering that this is particularly assigned as one of the causes of demurrer, we think this is a good objection, though it might be otherwise upon a general demurrer (a) as being only matter of form. We give no opinion whether it was necessary for the officers in this case to shew that the precept was returned (b), nor whether or no if they had not set forth the return but had relied only on the precept it would have been necessary for them to have concluded prout patet per recordum (c). But we are all of opinion that, they having taken upon them to set forth that the precept was returned, they ought to have concluded prout patet &c.

In none of the cases or entries (d) that were cited to shew that the pleas did not conclude in this manner was there any return alleged, and therefore those cases and entries do not come up to the present case. It is certain that if a sheriff justify under a returnable writ, he ought to shew that the writ was returned,

16 & 17 Car. 2. c. 8. is expressly confined to actions "in the courts of record at Westminster, the county palatine of Chester or Durham, and the great sessions in Wales." And by stat. 5 Geo. 1. c. 13., where a verdict has been given in any action "in any of his Majesty's courts of record" certain defects may be amended after a writ of error brought. Whereas the language used in the stat. 32 Hen. 8. c. 30., 18 Eliz. c. 14.; 21 Jac. 1. c. 13., and 4 & 5 An. c. 16. is "in any court of record." But notwithstanding this apparent distinction in these different statutes, it is observable that Lord Ch. B. Gilbert (*Hist. C. B.* 112, &c.) classes them chronologically, and says that those made prior to the 21 Jac. 1. c. 13. are confined to the courts above, and that that statute and all the subsequent ones extend to all courts of record.—With regard to the principal case, this determination seems perfectly correct, that the Mine Law Court could not amend under the stat. 8 H. 6.; but the language used by the Court "that the words of these statutes do not extend to inferior courts" should (it is presumed) be understood with this qualification, that the inferior court itself could not amend. For if a writ of error be brought in B. R.

from an inferior court for an error amendable by the stat. 8 Hen. 6. there seems to be no reason why the superior court should not amend that error; the words of the stat. 8 H. 6. c. 12. are not "in any action brought in any of the superior courts," but "for error assigned in any records &c no judgment shall be reversed &c, but the King's Judges &c may amend &c."—See also as to the error in this case, *Sherly v. Right*, 7 Mod. 30. where Lord Holt said, "If a writ be tested out of term, yet he (the sheriff) may safely execute it, but the plaintiff that sues it out cannot take advantage of such writ." Salk. 700. S. C.

(a) Vid. 4 & 5 An. c. 16.

(b) This being a writ of execution, it seems that it was not necessary to shew it returned. See *Mountney v. Andrews*, Cro. Eliz. 237; *Hoe's case*, 5 Co. 90.; and *Rowland v. Veale*, Cowp. 20.; though there is a contrary dictum in *Freeman v. Blewett* in Salk. 410., which is not indeed mentioned in the report of the same case in Lord Raym. 634.

(c) Semb. not; Vid. *Alanson v. Butler*, 1 Lev. 211.

(d) Vid. Lev. Entr. 176, 7; 197; 182; 206; and Thomps. Entr. 312; 333; 381.

but

but his bailiff or officer need not: and so it is expressly laid down in the case of *Briton v. Cole*, *Salk.* 408, 9. But whether or no these officers must be considered on the foot of the sheriff, as being the immediate officers to whom the Court directs the precept (a), (as was insisted on by my Brother *Eyre*) we need not determine at present, because the defendants have actually taken upon them to set forth the return in this case.

1738.

MORSE
against
JAMES.

It was said that the precept and return in this case are only an inducement to the justification; and where a matter of record is insisted on only by way of inducement, the plaintiff or defendant who insists upon it need not conclude prout patet per recordum. And several cases were cited to this purpose, particularly the case of *Waites v. Briggs* reported in 2 *Salk.* 565. and 5 *Mod.* 8 (b). We admit the rule, but we think that in the present case there is no colour to say that the precept and return are only matter of inducement; they are the very substance of the plea, and the only matter that is insisted on by the defendants for their justification. In the case of *Waites v. Briggs*, which was an action of debt on an escape, the judgment and execution might with some propriety be said to be only inducement, the escape being the gift of the action: but it is impossible to think that my Lord Ch. Just. *Holt* should say what he is reported to have said obiter in that case; "In an action of debt on a judgment *the judgment is only inducement*, and therefore the plaintiff need not conclude prout patet per recordum. If the judgment indeed be only matter of inducement in an action of debt on the judgment, then the precept in this case may be only inducement; nay it will be impossible that a record can be insisted on in any case whatsoever but it must be by way of inducement. But this must be the mistake of the reporter (c), for Lord *Holt* could not say so absurd a thing.

(a) If this had been only a writ on mesne process, it seems that these officers should have shewn that it was returned, *Kirke v. Atkins*, *Tr.* 14 *Car.*; 2 *Roll. Abr.* 563. pl. 18; and *Freeman v. Blewett*, 1 *Ld. Raym.* 634; in the former of which this reason is given, "Que il mesme est

l'officer que duisoit ceo retourner, et est come viscount deins cest jurisdiction."

(b) 1 *Ld. Raym.* 35. S. C.

(c) And this is not mentioned in the report of the case in *Salkeld* or Lord *Raymond*.

As

1738.

MORSE
against
JAMES.

As to the third objection; We are of opinion also that it is a good objection; for though an officer need not set forth the proceedings at length, and though he may justify under an erroneous process, yet he cannot unless it appear that it was a cause in which the Court had a jurisdiction. As for example, it has always been holden that a constable may justify under a justice's warrant in a matter wherein the justice had a jurisdiction (a), though the warrant be never so faulty: but that if a justice of peace make a warrant to a constable to arrest a man in an action of debt, such warrant will not justify the constable, because he was not obliged to obey it, and must take notice at his peril that it was in a matter concerning which the justice had no jurisdiction (b).

The jurisdiction of the Court out of which the precept issued, under which the defendants justified, is set forth in the plea to be only for the trial of *all actions personal touching the mines and miners of the said forest*. Now it is not set forth in the plea that the suit any ways related to the mines, nor is it said that the defendant was a miner *at the time of the action commenced*, but only said that he was a miner at the time when the precept issued, which he might be though he were not a miner at the commencement of the suit: but unless he was so then, the Court had no jurisdiction of the plaint; and nothing is to be presumed in favor of an inferior limited jurisdiction but what is particularly set forth.

As to the fourth objection; We, being clear as to the three first, need not give any opinion upon it. That the plaintiff or a mere stranger must set forth the proceedings at length, if he will justify under them, and that if he do not the plea of the officers who join with him is also bad, was thoroughly established in the case of *Moravia v. Sloper* (c), and the authorities which were there cited. But the only doubt here is, whether *Christopher* is to be considered as a mere stranger, it being said that the said *Christopher* acted as servant to the other two and at their request and in their aid and assistance.

(a) Vid. *Webb v. Batchelour*, 1 Ventr. 1002; and 2 Sess. Cas. No. 100.
273. (c) Sup. M. 11 Geo. 2. p. 30.

(b) Vid. *Shergold v. Holloway*, 2 Str.

It is said in the case of *Briton v. Cole* before cited that the Court seemed to hold "that if one come in the aid of the officer and at his request he may justify as the officer himself may do." But if this be understood generally, I doubt whether this be law; for a distinction (I think) ought to be made between an officer who executes a civil process and a peace officer who may command any one to assist him. But however, as there is no occasion, we give no opinion at present on this point.

Nor need we give any opinion on the fifth objection, that it is not particularly alleged where the court was holden &c: but we are rather inclined to be of opinion that it is well enough as it is, and that there was no occasion to set forth the particular place in the forest where the court was holden.

But, by reason of the three first objections, we are all of opinion that judgment ought to be for the plaintiff."

1738.

MORSE
against
JAMES.

LETITIA HODGSKIN, THOMAS HODGSKIN, and RICHARD PICKWORTH, *against* JOHN QUEENBOROUGH.

M. 12 G. 2.
Thursday,
Nov. 16th.

"COVENANT. The plaintiffs set forth an indenture between the plaintiffs and one *Priscilla Brown* deceased and the defendant, dated the 1st of *May* 1721, whereby the plaintiffs and the said *Priscilla* demised to the defendant several barns out-houses stables and other buildings, and amongst the rest a kiln, and several parcels of land with their appurtenances, to hold from the 25th of *March* then last past for the term of fifteen years under the rent of 13*l.* a-year payable at *Michaelmas* and *Lady-day*; and the defendant covenanted to keep all and singular the premises in good repair and to leave them so at the end or sooner determination of the term.

If, to covenant for not repairing certain premises demised, the defendant plead that the plaintiff before the cause of action accrued entered and pulled down the premises and expelled him, the plaintiff may reply that *de did not expel &c modo et forma &c.*

—But to an action of covenant for not repairing several premises the defendant cannot plead an expulsion by the plaintiff from part.

The plaintiffs then set forth that the defendant entered by virtue of the said indenture and was possessed of the premises, and that whilst he was so possessed and during the continuance of the said demise, *viz.*, on the 1st of *February* 1735 he permitted and suffered the cowhouse and barn to be out of repair and several other parts of the buildings and the kiln in particu-

L 1

lar,

1738.

HODGSKIN
against
QUEEN-
BOROUGH.

lar, (particularly specifying the buildings and the repairs that were wanting,) and that he permitted and suffered all the said buildings before specified to remain and continue so out of repair to the end and expiration of the said term, and left the same so out of repair; contrary to his covenant &c.

The defendant pleaded to the whole declaration that before the suffering any of the said premises to be so out of repair as in the declaration mentioned and before the said 1st of *February* 1735, viz. on the 1st of *May* 1730 the plaintiff *Letitia* entered into the said kiln parcel of the said premises so demised and a great part thereof, to wit, one half part thereof pulled down and him the said defendant from the said kiln and from the use occupation and possession thereof expelled and amoved and the said defendant so expelled and amoved from thence to the end and expiration of the said term held out &c; and this he is ready to verify &c.

The plaintiffs replied that the said *Letitia* did not expel amove and hold out the said defendant from the said kiln and from the use occupation and possession thereof in manner and form as the said defendant hath above alleged; concluding to the country.

The defendant demurred, and shewed for cause of demurrer that the plaintiffs by their replication put in issue matters not issuable or triable by a jury, and that the replication was insufficient &c (a).

Judgment (b) for the plaintiffs".

(a) The case was argued by *Bootle* Serjt. for the defendant, and *Draper* Serjt. for the plaintiffs. The former contended that the entry and pulling down were the material parts of the plea, and should therefore have been traversed; and that the matter denied, the expulsion, was only a conclusion of law from the entry &c. And he cited 1 *Roll. Abr.* 940. n. pl. 1.; *Cherburne v. Rye*, *Cro. Eliz.* 341; *Cibell v. Hill*, 1 *Leon.* 110; 11 *Rep.* 10.; *Allen v. Reeve*, cited in *Hardr.* 70.; *Raft.* 175. b.; *Robins.* *Entr.* 235.; *Brownl. Entr.* 260. pl. 115.; and *Carith v. Read*,

Moor 404. For the plaintiff were cited *Reynolds v. Buckle*, *Hob.* 326; *Roper v. Lloyd*, *Sir T. Jon.* 148; and *Barker v. Fletwell*, *Gailb.* 70.

(b) The reasons given by the Court do not appear in Lord Ch. J. *Willes's* note book; the following note is taken from Mr. Just. *W. Fortescue's* book—

"*Willes*, *Ld. Ch. Just.*—This is an action of covenant on a deed, in which the defendant covenants to keep certain premises, of which the kiln is one, in repair; the breach is for not repairing a great many parts as well as the kiln. The defendant

defendant pleads one plea to the whole, viz., that the plaintiffs entered into the kiln and expelled the defendant from the use and occupation thereof. The plaintiffs reply that the defendant did not expel him in manner and form. Now this is certainly a matter traversable: if every entry and pulling down be an expulsion, the expulsion is traversable; modo & forma put the whole in issue. A man is only obliged to traverse a material part of

the plea; the expulsion here is the only fact material; neither the entry or pulling down is an expulsion (1). If it had been for not repairing the kiln only, it might have been an excuse: but as it is pleaded, the plea is no answer to the declaration; and the replication is good.

The other Judges were also of the same opinion."

(1) In *Taylor v. Cole*, 3 Durnf. & East. 292, (the judgment in which case was affirmed in the Exchequer-Chamber on error, 1 H. Bl. Rep. 555.) it was holden that in trespass for breaking and entering the plaintiff's house and expelling him therefrom the breaking and entering are the gist of the action, and the expulsion only matter of aggravation; that therefore a justification as to the breaking and entering covered the whole declaration; and that, if the plaintiff meant to insist on the expulsion as making the defendant a trespasser ab initio, he should insist on that by a replication or a new assignment.

WILLIAM EATON *against* ROBERT SOUTHEY.

Hil. 12 G. 2.

Saturday,
Feb. 10th.

[T. 10 & 11 Geo. 2. Rol. 2301, 2.]

THE opinion of the Court was thus given by

Willes Ld. Ch. Just. "Replevin for seventy cocks or shocks of wheat taken 31st July 1736.

The defendant avows taking them because the locus in quo contains ten acres of land, and that before the taking, to wit, 20th April 1736 the defendant was seised of a messuage and one hundred and one acres of land, of which the said ten acres were parcel, in fee; and that being so seised before the time when &c, to wit, the same day and year he demised the

husbandry to be carried is sufficient, without saying how long it remained there; the reasonableness of the time being a question of fact for the jury, and not a question of law for the Court.

—Goods are bound by the delivery of the fieri facias to the sheriff; and therefore he may execute the writ notwithstanding the death of the party afterwards and before the return of it.

—If the estate of a tenant at will be determined either by his death or by the act of the landlord, he or his executors may reap the corn sown by him.

—And therefore the corn sown by a tenant at will (who died before harvest) and purchased by another person cannot be distrained by the landlord for rent due to him from a subsequent tenant.

—Whether goods taken in execution can be distrained for rent? Qu.

Whether an action be real or personal depends on the thing to be recovered by it, and not on the nature of the defence; and therefore a replevin is a personal action, though the title to land be brought in question.

—7 Mod. 251. 8vo. edit. S. C.

Pleading that A. having been lawfully possessed &c. as tenant at will to B., is a sufficient averment that A. was tenant at will &c.
—Pleading that corn which had been cut was left on the ground until it was fit in a course of

said

1738.

HODGKIN
against
QUEEN-
BOROUGH.

1738,9.

EATON
against
SOUTHBY.

said tenements to *Thomas Dunsby* to hold from thence for one year at the rent of 125 *l.* a-year payable quarterly, the first payment to be made on the 21st of *July* next; that by virtue of the said demise the said *T. Dunsby* entered and was possessed; and because 31 *l.* 5 *s.* of the said rent for one quarter due on the said 21st of *July* was in arrear he distrained the said 70 cocks or shocks, being on the premises, for the said rent.

The plaintiff pleads in bar to the avowry that before the time when &c, to wit, *H. 9 Geo. 2.* one *Henry Lasher* recovered a judgment in *B. C.* against one *G. Sanders* for a debt of 200 *l.* and 50 *s.* damages; and that afterwards, to wit, on the 12th of *February 9 Geo. 2.* a fieri facias issued out of the said court directed to the sheriff of *Oxfordshire* to levy the said debt and damages on the goods of the said *G. Sanders*, which writ was returnable *crastino Ascensionis*. And the plaintiff further pleads that afterwards, to wit, 22d *March* then following the said writ was delivered to the sheriff of *Oxfordshire* to be executed, and afterwards the said *G. Sanders* died; and afterwards and before the said time when &c, viz, 15th of *April* then following seven acres of the premises having been sown with wheat by the said *G. Sanders* in his lifetime and the said *G. Sanders* at the time of the said sowing having been lawfully possessed of the said place &c as tenant at will to the said *Robert* (the defendant) and also at the time of his death, the said sheriff before the taking &c. to wit on the 15th of *April* then next seised and took in execution by virtue of the said writ the said wheat so growing, and afterwards and before the time &c. viz. 23d of *April* sold the said wheat to the plaintiff in further execution of the said writ, whereof the defendant then and before the time when &c had notice; and that the plaintiff being so possessed and entitled did suffer the said wheat to grow on the place where &c until it was ripe and fit to be cut; and afterwards and before the time when &c, viz. 29th of *July* next the plaintiff entered into the premises in order to cut the wheat being then ripe and fit to be cut, and did cut the same, and made it into cocks or shocks, whereof the said seventy cocks were parcel; and the said cocks or shocks being so cut, the plaintiff suffered the same to lie on the said seven acres until the same in a course of husbandry was fit to be carried away; and the said wheat being so

so cut and lying on the premises until it was fit to be carried away according to the course of husbandry, the defendant of his own wrong took and distrained the same under pretence of a distress, the said wheat at the time of such distress not being fit to be carried away according to the course of husbandry. And the plaintiff further saith, that at the time of the said distress there were other goods on the premises sufficient to answer the value of the said rent; and avers the identity of the wheat, and prays judgment.

1738,9.

EATON
against
SOUTHEY.

To this plea the defendant demurs generally; and the plaintiff joins in demurrer.

And several objections (a) were taken by the defendant to this plea.

1st, That it is not sufficiently set forth that *G. Sanders* was tenant at will to the defendant.

2^{dly}, That it ought to have been particularly shewn how long the wheat remained on the land after the cutting, that the Court might judge whether it were a reasonable time or not.

3^{dly}, That, *G. Sanders* dying before the goods were taken by virtue of the fieri facias, the execution was not well executed, for that it could not be executed after the death of the party.

4^{thly}, That though the corn had been legally taken in execution, yet that it being suffered to remain on the land was liable to be distrained for rent.

As to the first objection; we are of opinion that it is sufficiently set forth in the plea that *G. Sanders* was tenant at will at the time of sowing the corn and also at the time of his death. If this indeed were otherwise, it would be an objection in substance and not form only, and consequently might be well taken advantage of on a general demurrer. For the whole merits of the plea depend on *G. Sanders's* being tenant at will &c; if he were not so, the whole plea is at an end. But pleas must be construed according to a common intent; and a man must strain

(a) This case was twice argued; the first time on the 1st of May 1738 by Belfield Serjt. for the defendant, and Wright Serjt. for the plaintiff; and on the 29th of June 1738 by Skinner King's Serjt. for the former and Eyre King's Serjt. for the latter.

1738, 9.

EATON
against
SOUTHEY.

indeed to say that this plea does not plainly intend that *G. Sanders* was tenant at will. The word *as* tenant at will affords no objection; it being the constant method of pleading that a man was seised in his demesne *as of fee*. The other words "having been" we think likewise well enough. The word "being (a)" would have been the more common expression: but as this part of the plea relates to the time past, we are of opinion that the words "having been" are more proper than the word "being."

As to the distinction between real and personal actions, and that a replevin is to be considered either as a real or personal action according as the defendant shall happen to avow, as is laid down in *Finch's Law*, p. 316. (b), and in some other books, we think that it is a distinction that will appear on examination to be without foundation. For an action is either real or personal according as the thing to be recovered by that action is either real or personal; and as nothing that is real can be recovered by this action, be the recovery what it will, it cannot be considered as a real action. If the nature of the defence would make a difference, actions of trespass wherein the title of land is brought in question by the plea, and actions of debt for rent wherein the title of the land may come in question, nay even actions of debt on a bond against an heir where *riens per discent* is pleaded, must be considered as real actions; which yet would be most absurd.

As to the second objection, that it ought to have been particularly set forth how long the corn lay on the land after it was cut, that the Court might judge whether it were a reasonable time or not; we think also that this objection will not hold. For though it is said in *Co. Lit.* 56. b. that in some cases the Court must judge whether a thing be reasonable or not, as in

(a) "Being" has been holden to be an averment even in criminal proceedings; *R. v. Moor*, 2 *Mod.* 128; *R. v. Boyall*, 2 *Burr.* 832; and *R. v. Bootie*, 2 *Burr.* 864. See *Mead v. Robinson*, *M.* 17 G. 2. *post*.

(b) It is observable of the two authorities, referred to by *Finch* in support of his opinion, that "a replevin for goods dis-

trained which according to the nature of the plea ministered by the parties groweth to be either a real or personal plea," that the first *F. N. B.* 155. to 160. is entirely silent on the subject, and the other 4 *H.* 6. 30. is only an argument of counsel; *Cotesmore* who used it not being appointed a Judge until 1430., which was five years after the 4 *Hen.* 6.

case

case of a reasonable fine, a reasonable notice, and the like, it is absurd to say that in the present case the Court (a) must judge of the reasonableness; for if so, it ought to have been set forth in the plea not only how long the corn lay on the ground, but likewise what sort of weather there was during that time, and many other incidents, which would be ridiculous to be inserted in a plea. We are of opinion therefore that this matter is sufficiently averred, and that the defendant might have traversed it if he had pleased; and then it would have come before a jury, who upon hearing the evidence would have been the proper judges of it.

Thirdly; As to what was said that, the party's dying before the actual execution of the fieri facias by the sheriff, the sheriff could not take the corn after the death of *G. Sanders*, we are of opinion that the law is otherwise. As to what was said in answer by my Brother *Eyre* that it has been holden generally that if the party die after the teste and before the return of the writ, the writ notwithstanding may be executed, we give no opinion; for if *G. Sanders* had died before the writ had come to the hands of the sheriff (b), it might have admitted of some doubt. But we think that there is no doubt here, it being expressly alleged that the fieri facias was delivered to the sheriff before the death

1738, 9.

EATON
against
SOUTHBY.

(a) In *Metcalfe v. Hall*, and *Appleton v. Sweetapple*, Tr. 22 G. 3. and *M. and H.* 23 G. 3. B. R. where the question was what was a reasonable time within which a banker's check should be presented for payment in London, some of the Judges said that "what was a reasonable time was a question of law;" and they wished the jury to consider a check presented within a reasonable time, if presented on the day next after that on which it was given: after four trials however the verdict of the jury prevailed, by which it was decided that the plaintiffs had made the check their own, by not presenting it on the day when it was given, the bankers stopping payment the next day.

But in a subsequent case, *Tindal v. Brown*, 1 D. & E. 168. Lord Mansfield said "What is reasonable notice (by the holder of a bill of exchange to the drawer or indorser that it is dishonoured by the

acceptor) is partly a question of fact and partly a question of law." So in *Bell v. Wardell*, E. 1740, B. C. post, where a custom was pleaded that the inhabitants of a town might walk or ride over certain closes of arable land at all seasonable times of the year, it was ruled that what was a seasonable time was partly a question of fact and partly of law.

(b) It appears from the case of *Bragner v. Langmead*, 7 Durnf. & E. 20. and the cases there referred to, that the sheriff might have proceeded to execute the writ notwithstanding the death of the party before it came to the sheriff's hands; for the goods of a defendant were at common law bound from the teste of the writ, and the statute of frauds, 29 Car. 2. c. 3. s. 16., which enacts that they shall only be bound from the delivery of the writ to the sheriff, only relates to purchasers, and not to the defendant himself.

of

1738, 9.

EATON
against
SOUTHEY.

of *G. Sanders*; and consequently by the stat. 29 *Car. 2. c. 3. s. 16.* it bound the property of the goods from that time, and therefore the sheriff might sell them afterwards whenever he pleased. The case (a) which was cited of a warrant to levy a poor's rate is in no wise like this; for the warrant is no lien on the goods of the party until it is actually executed.

Fourthly; But the principal objection was whether the goods being taken in execution could afterwards be distrained; and if the goods had been the goods of the new tenant *T. Dunfby* and had been taken by virtue of an execution against him (which would have brought this point in question) it might have required very good consideration, it being a point of great consequence. That goods taken in execution, or even goods distrained damage feasant, are in the custody and under the protection of the law and therefore cannot be distrained for rent, is expressly holden in *Co. Lit. 47. a.*, and several other books (b). And we are inclined to be of this opinion. But if it were necessary for us to give any positive resolution on this point, it would be very proper to consider whether the statute 2 *W. & M. c. 5.*, and the stat. 8 *An. c. 14.*, have made any alteration in this respect. But we think we have no occasion to enter any further into this matter, because we are all clearly of opinion that if there had been no execution in the present case yet the corn could not be distrained.

The law is that, if the estate of a tenant at will be determined either by his death or the act of his landlord, he in the one case and his executors or administrators in the other shall reap what he has sown; and that the tenant at will or his representatives shall have free liberty of ingress egress and regress to come upon the land and to cut and carry away the corn. These are the express words of *Lit. sect. 68.*; and it has been undoubted law ever since. And yet there will be an end of this law if the present distress can be maintained. For a landlord will have nothing to do but to determine the estate of his tenant at will as soon as he has sown all his corn, and then to

(a) *Wallis administrator v. Huett, Hil. 5 G. 2. C. B.*

(b) *Vid. Park. Rep. 120. et seq.*

let his land to another reserving rent upon a day before harvest; and then, as in the present case, he may distrain the corn as soon as it is cut; since by the stat. 2 *W. & M. c. 5.* he may now distrain corn loose or in sheaves: but this is so absurd and contrary to common sense that but stating the case is sufficient to answer it. And it was rightly observed by the counsel for the plaintiff that a landlord in this case has no power to let the land but subject to the same condition as he himself held it. And yet this, when it is considered, is the whole of the present case.

1738, 9.

EATON
against
SOUTHEY.

We are therefore all clearly of opinion that judgment must be given for the plaintiff (a)."

(a) A writ of error was afterwards brought in *B. R.* to reverse this judgment, and in *Mich. 14 Geo. 2.* two objections were taken by the counsel for the plaintiff in error; 1st, that though an estate in fee may be pleaded generally, yet that the commencement of all particular estates ought to be shewn in pleading, because it is traversable; 1 *Inst. 303. b.*; and that therefore as the plaintiff below claimed title under *Sanders*, he should have shewn how *Sanders's* title commenced. 2dly, That the corn was not privileged from distress at the time, because the sheriff had not only sold the corn but had returned the writ, and that the law had had its effect.

To this it was answered; 1st, that *Sanders's* title was immaterial; for that the plaintiff below did not derive title under *Sanders*, but merely shewed that *Sanders* had such a possession in the premises both at the time of sowing the corn and at the time of his death as made the corn liable to the execution; and that the plaintiff was a stranger to this estate, and therefore could not set it out in pleading.

Tucker v. Hodges, Carth. 209;—and 2dly, that the corn was not distrainable, because when the continuance of an estate is uncertain and determined by the act of God the lessee or his representatives are entitled to the emblements, for which purpose the law gave them ingress egress and regress; that the vendee of the lessee must have the same privilege; but that this privilege would be destroyed if as soon as the corn is cut and before it is ready to be carried away it were liable to a distress for rent due from a stranger; and that therefore the law gave the party a reasonable time to take away the corn.

Lee Chief Justice thought there was no foundation for the first objection: but doubting on the second, a further argument was awarded.—*MS. Coll. Willes* Chief Justice.

—The plaintiff in error died before any judgment was given in *B. R.*; and it seems probable from a note in *Barnes 206.* that the plaintiff below had the fruits of the judgment given in his favor in *B. C.*

1738, 9.

Hil. 12 G. 2.
Monday,
Feb. 12th.

ROBERT MOONE on the Demise of JOSEPH FAGGE
against CHRISTIANA HEASEMAN.

Devise of a farm called &c to A. for life, remainder to her daughter B. she paying to each of her two sisters C. and D. 500l.; if either of them die, the survivor to have the legacy; if B. die the farm to be divided between the survivors; and in case all three die before A. then to the heirs of A. for ever;—held that C. and D. were each entitled to a moiety of the farm in fee on the contingencies of their surviving their mother (A.), and of their sister (B.) dying before she paid their legacies.

—So, if the latter part of the devise “in case all three die before A. then to A.’s heirs &c” had not been added. —A devise to A., he paying debts or a legacy, will carry the fee.

THE following opinion of the Court was delivered by

Willes Lord Chief Justice. “Ejectment of lands in *Cowfold* and *Shermonbury* in *Suffex*; not guilty pleaded; and a special verdict found, on which it now comes on.

It was found that the whole farm, of which the lessor of the plaintiff only claims a moiety, is 110l. a-year; and that one *Susannab Morley* being seised of the whole in fee made her will 3d *March* 1676, and thereby devised the same in these words; “As for my lands in *Cowfold* called *Gratwick* and *London* or by whatsoever name or names that farm is called or known, I give to my sister Dame *Mary Fagge* during her natural life, and after her decease to her daughter *Susannab Fagge*, paying to each of her sisters *Elizabeth* and *Mary Fagge* 500l. a-piece of good and lawful money of *England*; and if either of them die, the survivor of them to have the legacy; and if the said *Susannab Fagge* die, I will that the farm be divided between the survivors, and in case all three daughters die before their mother, I will it descend to the right heirs of Dame *Mary Fagge* my sister for ever.”

That *Susannab Morley* died without issue 11th *March* 1676; and that Dame *Mary Fagge*, then wife of Sir *John Fagge*, was her only sister and heir, who had three daughters, *Elizabeth*, *Mary*, and *Susannab*, and seven sons, *Robert*, *Titus*, *James*, *George*, *Charles*, *Thomas*, and *Joseph*. That after the death of *Susannab Morley*, Sir *John Fagge* in the right of his wife entered and was seised in the right of his wife for and during her natural life. That *Susannab Fagge* died in the lifetime of her mother without issue, viz. on the 7th of *August* 1678. That *Mary* married one *John Spence* and had issue *John*, and died in the lifetime of her mother, viz. on the 8th of *October* 1683. That Dame *Mary Fagge* the mother died on the 22d of *November* 1687. That after her death *John Spence* son and heir of *Mary Spence* entered into a moiety of the premises; and *Elizabeth Fagge* entered

tered upon the other moiety, and was seised thereof, and being so seised afterwards married one *Philip Gell*, who afterwards entered and was seised thereof in the right of his wife *Elizabeth*; and being so seised he and his wife by indenture 1st September 1713 covenanted with *John Curson* and *William Fitzberbert* to levy a fine of their moiety the next *Michaelmas* term to the use of them and the survivor of them for their lives and the life of the survivor, and after their deceases to the use of *Charles Fagge*, the fifth son of Dame *Mary Fagge*, for his life; then to trustees to preserve contingent remainders; then to the use of *James Fagge* eldest son of the said *Charles* and the heirs male of his body, and for default of such issue to the use of the second son of the said *Charles* and the heirs male of his body, and for default of such issue to other uses mentioned in the said indenture. That a fine was levied accordingly in the *Michaelmas* term following.

That after the levying of the said fine *Charles Fagge* had a second son born, by name *Joseph*. That *Charles Fagge* died 12th of March 1714. That *Elizabeth Gell* died without issue 11th of June 1716; and *Philip Gell* 17th of June 1719; after whose death *Robert Fagge*, eldest son of Dame *Mary*, entered into the premises in question and was seised; and being so seised 29th of September 1719 he made a lease to *Christiana Heafeman* for twenty-one (a) years, by virtue of which she entered and was possessed. That *James Fagge*, the eldest son of *Charles*, afterwards viz. 15th of October 1730 died without issue; after whose death and before the time when &c *Joseph* his next brother entered upon the said *Christiana Heafeman* before her term was expired; and on the 2d of October 5 Geo. 2. demised to the plaintiff to hold for five years from the 1st of October before; by virtue of which demise he entered and was possessed until the defendant *Christiana* entered upon him and ejected him.

And the question (b) upon this special verdict depends wholly upon this, whether *Elizabeth Fagge* (afterwards *Gell*) took a fee-simple in a moiety by the devise of *Susannah Morley*, or only an estate for life?

(a) By consent the term was enlarged for five years by rule of court.

(b) This case was twice argued, by

Parker King's Serjt. and *Draper Serjt.* for the plaintiff, and by *Belfield* and *Wynne* Serjeants for the defendant.

1738, 9.

MOONE
dem. FAGGE
against
HEASEMAN.

1738, 9.

MOONE
dem. FAGGE
against
HEASEMAN.

If she took a fee-simple, judgment ought to be for the plaintiff;

If only an estate for life, for the defendant; for then upon her death the estate descended to her eldest brother *Robert* (under whom the defendant claims) as heir to Dame *Mary Fagge*. And we are all of opinion that *Elizabeth* took an estate in fee.

The first question that was made (and to be sure a very material one) was what estate *Susannah Fagge* took by the devise to her; because it would be hard to maintain that her two sisters could have larger estates than she took.

It was agreed that many words would pass a fee-simple in a will which would not do so in deeds, if the intent of the testator plainly appears. But it was insisted that the words made use of here were not sufficient for that purpose; for it was said that it is here found that Dame *Mary Fagge* was heir to the testator, and consequently her eldest son *Robert*, under whom the defendant claims, was heir after the death of his mother; and the rule is, as it is expressly laid down in the case of *Gardner v. Sheldon, Vaugh.* 262, 3. that an heir shall never be disinherited except by express words or such as have a necessary implication. But, if this rule were to be taken strictly, it would overturn a great many resolutions. I might mention a multitude of cases to this purpose: but I choose rather to confine myself to those which are exactly parallel to the present. If a man devise an estate to another *paying his debts* or *paying a certain sum* in gross, the devisee takes a fee-simple. It was indeed formerly a doubt whether or no he took a fee-simple unless the sum devised exceeded the annual value of the estate. But it has been long settled that such devise gives a man a fee-simple without any regard to the quantum of the debts or of the sum devised to be paid and the value of the lands.

And so it is expressly held in *Co. Lit.* 9. b; 3 *Co.* 21. a; *Boraston's case*; 6 *Co.* 16. a; *Collier's case*; *Cro. Eliz.* 378. S. C. *Bendlow* 37; *Cro. Eliz.* 205; *Wellock and Hamond*; 1 *Rol. Abr.* 834. pl. 5; *Cro. Jac.* 527; the case of *Spicer v. Spicer*; *Cro. Jac.* 599; *Greeve v. Dewell*; 2 *Mod.* 25. *Reed v. Hatton*; and
in

in many other cases (a). And the reason which is given for it in 6 Co. and in several other books is that every devise must be taken to be intended by the devisor to be for the benefit of the devisee; whereas if he (b) be obliged to pay the debts of the devisor or a certain sum in gross, if the devisee should happen to die before he can raise the money out of the profits of the estate, if he were only to take an estate for life he would be damnified and not benefited by this devise. But if *Vaughan's* rule were to hold, there would be an end of this way of reasoning, and all those cases must be overturned. For though this expression of paying the debts &c makes it highly *probable* (c) that it was the devisor's intention that the devisee should have an estate in fee, yet it is very far from being a *necessary* (d) implication. For in many of the cases the money devised to be paid was not near the value of an estate for life in the premises, and therefore it was possible that the testator might intend that he should only have an estate for life, because he might sell that estate immediately, and then he would be sure to be a gainer by the bargain. But as this is a foreign and not a natural construction, it has been always rejected. However these cases shew that my Lord *Vaughan's* rule is not right.

1738, 9.
MOONE
dem. FAGGE
against
HEASEMAN.

But the rule is that the intent of the testator ought to appear plainly in the will itself, otherwise the heir shall not be dis-

(a) See the cases collected in 8 Vin. Abr. 222. &c. "Devise" S. a.—See also *Baddeley v. Leppingwell*, 3 Burr. 1533; *Frogmorton v. Holyday*, 1 Bl. Rep. 537, and 3 Burr. 1618; *Goodright v. Allin*, 2 Bl. Rep. 1041; *Loveacres v. Blight*, Cowp. 352; *Doe d. Palmer v. Richards*, 3 Durnf. & E. 356; *Doe d. Beezley v. Woodhouse*, 4 D. & E. 89; *Goodright d. Baker v. Stocker*, 5 D. & E. 13; *Andrew v. Southouse*, ib. 292; *Doe d. Willey v. Holmes*, 8 D. & E. 1; and *Jenkins v. Jenkins*, Mich. 26 Geo. 2. C. B. post.—But this rule does not apply to cases where an estate-tail is given to the devisee; *Doe d. Hanson v. Fyldes*, Cowp. 833; and *Denn d. Slater v. Slater*, 5 D. & E. 335.

(b) But the devisee does not take a fee where the charge is not on the estate in his hands; as where the devise was to A.

"after payment of my just debts and funeral expences." *Denn d. Moor v. Mellor* 5 D. & E. 558; and 6 D. & E. 175.

(c) In *Reed v. Hatton*, 2 Mod. 26. the Court said "If there be a devise to one upon condition to pay a sum of money, if there be a possibility of a loss, though not very probable that the devisee may be damnified, it shall be construed a fee; and such construction hath been always allowed in wills."

(d) See also *Goodright v. Allin*, 2 Bl. Rep. 1042. where De Grey Chief Justice said the defendant must take a fee "by implication, not indeed a necessary implication, strictly and mathematically speaking, but so far necessary, as it clearly arises from the reasonable construction of the will."

O o

inherited.

1738, 9. inherited. Upon the strength of these cases it is plain that *Susannah*, if she had outlived her mother, would have taken a fee-simple by this devise; the money which she is directed to pay being (as it is found by the special verdict) near ten times the annual value of the estate.

MOONE
dem. FAGGE
against
HEASEMAN.

As to the objection drawn from the subsequent words "*if she die the farm to go to her sisters*," we think it is of no weight; for these words must be intended to mean "if she die before she has paid the legacies." These words are twice made use of in this clause; and in the first part of it they will not bear any other construction, where it is said "*if either of them die the survivor of them to have the legacy*;" for it could never be intended that after the legacy paid neither of them should make use of the money until it was seen which of them was entitled to it by survivorship. And in this place it would be absurd to say that if she lived to pay her sisters their legacies and thereby became a purchaser of the estate, yet that she should have it only for life. We think therefore that these words afford no reasonable objection.

Taking it therefore for granted that *Susannah* took an estate in fee, the next question is what estate her sisters *Elizabeth* and *Mary* took on her dying before the payment of their legacies. And if the words of the will had gone no farther than that in that case the farm should be divided between them, yet we should have thought that they would have taken a fee. For it is plain that the testatrix intended that they should have the same interest in it as *Susannah*; and it is given to them in lieu of their legacies which they might have disposed of as they pleased; and therefore it is highly reasonable that they should have the same power over the estate.

But if there were any doubt on these words, we think that the subsequent words "in case all three daughters die before their mother that it shall descend to the heirs of the mother" have put it beyond all dispute, and plainly shew the intent of the testatrix. For if she intended that the daughters should be only tenants for life, and consequently that it should go to the heirs of the mother whether the daughters died before their mother or not, it would have been most absurd in her to say that it should

should go to the heirs of the mother *in case the daughters die before her*. Unless therefore these words are rejected (which to be sure they cannot) they plainly exclude any such construction that the testatrix intended them only an estate for life, even though they outlived their mother.

1738, 9.

MOONE
dem. FAGGE
against
HEASEMAN.

And this is exactly agreeable to what is said by *Saunders* at the end of the case of *Purefoy v. Rogers*, 2 *Saund.* 388. It is not indeed the point as adjudged there: but *Saunders* was a very great man, and his reasoning in that case is I think unanswerable. The words there were, a man gives the inheritances of his lands to his wife for life and then to her son after his mother's life, and if he die before he comes to the age of twenty-one years, then he gave the inheritances of his lands after his wife's life to his own heirs for ever. The words are exactly parallel to the present; and *Saunders* argued that by the words "if he die before twenty-one, then the estate should go to his own heirs," he must mean that "if he lived to be twenty-one, it should not go to his own heirs," but that the son should have an estate in fee. It was said indeed in the present case that the word "inheritance" was in that devise, which *vi termini* carries a fee: but *Saunders* did not take notice of this; and it is plain no argument could be drawn from it, because the testator used the very same word when he gave the estate to his wife only for her life.

The strongest authority that was cited against this construction in the argument of the present case was the case of *Pettywood v. Cooke*, *Cro. Eliz.* 52 (a), where a man gave three messuages to his wife for life, and then the remainder of one of them to his son and his heirs, of another to her daughter and her heirs, and of the third to another daughter and her heirs, and if any of them died without issue, then the survivors should enjoy totam illam partem equally to be divided between them; where it was held that these words gave only an estate for life to the survivors. If I had been to give my opinion on that case, I own, (as I am at present advised) I should have thought otherwise. But taking it to be law, there are no such words there as are in the present case "if all three die before such a

(a) 3 *Leon* 180. by the name of *Putnam* and *Cook's* case.

1738, 9.
 MOONE
 dem. FAGGE
 against
 HEASEMAN.

time," that then it should descend to the right heirs of the devisor, which are the words on which we principally rely in the present case. There was an argument made use of on both sides from the penning of this clause in the will: on the one side it was said that when the testatrix intended to give only an estate for life she has given it by express words, for she devises the estate expressly to Dame *Mary Fagge* for her life; and on the other side it was said that when she intended a fee-simple she has done it by proper words; for she has given it expressly to the right heirs of Dame *Mary Fagge*. But as this argument is equally strong both ways, it proves nothing at all.

But for the other reasons which I have already given we are all of opinion that *Elizabeth* and *Mary* took estates in fee upon the contingencies of their surviving their mother and of their sister's dying before she paid their legacies, both which contingencies happened; and therefore we are of opinion that judgment must be given for the plaintiff (a)."

(a) The following private note was added in Lord Chief Justice *Willes*'s book:

"It is said in *Cro. Car.* 369. and agreed by the whole Court in the case of *Spirit v. Bance* that the words in a will which disinherit an heir ought to have an apparent intent and not to be ambiguous and doubtful, and that the intent ought to be collected out of the words of the will, and not from any foreign intendment or averment. And there is the same declaration by the Court in the case of *Wilkinson v. Merryland*, *Cro. Car.* 450; which is exactly agreeable to the rule which I have laid down in this case, and shews that the rule laid down by *Vaughan* in the case of *Gardner v. Sheldon* is a new notion of his, and not the right rule."

—The judgment (above given) was affirmed in error, *M. 15 Geo. 2. B. R.* after three arguments at the bar.—In addition to the points discussed in the Common Pleas, another objection was taken

in *B. R.* by the plaintiff in error, that the judgment was erroneous because it was a judgment for a divided moiety, whereas the two sisters *Elizabeth* and *Mary* were tenants in common, and therefore the judgment ought to have been for an undivided moiety.

But the Court answered this by saying that it did not appear that they were tenants in common at the time of bringing the ejectment, but that on the contrary it appeared that the heir of *Mary* entered into one moiety, and the lessor of the plaintiff into the other for which the ejectment was brought. But even admitting that the lessor of the plaintiff was a tenant in common, they said there was no weight in the objection, for that one tenant in common could not create a severance by action, and that a judgment to hold in severalty would make no division.—*MS. Coll. Willes* Chief Justice.—And vid. *7 Mod.* 433. oct. ed.

1739.

E. 12 G. 2.
Tuesday,
May 22d.THOMAS CORNISH *against* WALTER BOLITHO.

"CASE. The first count is on a promisory note for 7*l.* 10*s.* dated the 12th of *July* 1736, signed by the defendant, payable to the plaintiff or order on demand, for value received. The second count is the same; but it goes on and says that before the signing of the note last-mentioned it was then and there agreed by and between the plaintiff and the defendant that in case the said *Walter* (the defendant) should buy the malt expended in his dwelling-house for the three years next ensuing of the plaintiff, then the note last-mentioned was to be void; and the said plaintiff was to serve the defendant in the same manner as the rest of the customers of the plaintiff; and the plaintiff avers that since the making of the said note the defendant hath expended great quantities to wit 100 quarters of malt in his dwelling-house, and that the said defendant did not buy the said malt so expended or any part thereof of the said plaintiff, but neglected so to do.

There were likewise two other counts, which were not material to the point in question.

The defendant to the first third and fourth counts pleaded the general issue that he made no such promise, and issue is joined thereupon; and demurs to the second, and assigns for cause of demurrer that the plaintiff hath not shewn in his declaration that he from the time of making the said agreement did use and exercise the trade and business of a maltster, and was ready and willing to sell and deliver to the said *Walter* such malt as he the said *Walter* expended in his dwelling-house from the time of making the said agreement until the day of obtaining the original writ.

The plaintiff joins in demurrer.

Huffey Serjt. for the defendant agreed that in the case of mutual promises there is no occasion for an averment of mutual performances, as is held in 1 *Saund.* 320; 1 *Lev.* 274; and the case

P p

of

The plaintiff declared on a promisory note given to him by the defendant, and alleged that before the note was given it was agreed between them that if the defendant should buy of the plaintiff all the malt expended in his dwelling-house for three years the note should be void; averring that the defendant had expended a certain quantity of malt &c but had not bought it of the plaintiff:

—Held good on demurrer; because the note formed no part of the agreement, or at the most that the agreement must be considered only as a defeazance, and then if the defendant would take advantage of it he should shew the performance on his part.

1739.

CORNISH
against
BOLITHO.

of *Blackwell v. Nash* (a), *M. 9 Geo. 1. B. R.*, but he insisted that this was part of the agreement and the only consideration that appeared for the note; and that therefore the plaintiff ought to have averred that he was ready and willing to have performed so much of the agreement as was necessary to be done on his part, and that the defendant refused to perform his part of the agreement; and for this purpose he cited *Lamb's case*, 5 *Co.* 23, *b.*; 3 *Lew.* 319, *Keech v. Knight*; and 1 *Latw.* 490. He likewise insisted that the plaintiff ought to have averred that it was the same dwelling-house that the defendant lived in at the time of the agreement; and for this he cited *Cro. Jac.* 235.

Draper Serjt. contra admitted all the cases, but said that they were all distinguishable from this; for that here the agreement is no part of the note, and the action is founded merely on the note; the rest therefore ought to be rejected as surplusage, or at most the agreement can be considered only as a defeazance, and therefore if the defendant will take any advantage of it he must shew the performance on his part; and

Of this opinion were *The whole Court*; and to the other objection, to which no answer was given by *Draper*, I answered that the averment is as certain as the agreement, for it does not mention any particular dwelling-house.

So judgment was given for the plaintiff."

(a) *Vid.* 8 *Mod.* 106; and 1 *Str.* 535.

Friday,
May 25th.

HUGH MUCKLESTONE *against* CATHERINE THOMAS
Executrix of JOHN THOMAS.

The lessee
covenanted
to put a house
in repair be-
fore the 1st
of June,
"5000 slates
being found
allowed and delivered by the lessor towards the repair", and afterwards to keep it in repair during the term.

"COVENANT. The plaintiff sets forth an indenture dated 1st of *February* 1720 between the plaintiff and *John Thomas*, whereby the plaintiff let unto *John Thomas* his executors administrators and assigns a messuage or dwelling-house situate

The lessor assigned a breach for not keeping in repair after the 1st of June: held no plea to say that the lessor had not after making the lease found allowed and delivered the slates &c.

situate lying and being in *Gfwestry*, together with all outhouses buildings &c thereto belonging from the first of *May* then next for twenty-one years under the yearly rent of 9*l.* payable half-yearly, the first payment to begin at *Michaelmas* then next. And the said *John Thomas* covenanted for himself his heirs executors and administrators with the plaintiff his heirs executors administrators and assigns that he the said *John Thomas* his executors and administrators and every of them should on or before the first day of *June* next ensuing the date of the said indenture, or sooner if possible, at his and their own proper costs and charges repair amend and put the said messuage or dwelling-house and all other the buildings thereby granted in sufficient tenantable repair, 5000 *slates* being found allowed and delivered on the said premises by the said *Hugh Mucklestone* his heirs and assigns for and towards the repairing thereof; and all and singular the said premises being so well and sufficiently repaired and amended should and would from time to time and at all times during the continuance of the said indenture of demise maintain sustain and keep at his and their like costs and charges, and at the end of the said term or sooner expiration thereof should so leave and yield up the same to the said *Hugh Mucklestone* his heirs and assigns (fire excepted). That the said *John Thomas* on the said first of *May* entered by virtue of the said demise and was possessed until his death; and on the first of *April* 1734 made his will in writing and appointed the defendant sole executrix; and afterwards to wit on the 7th of *April* 1734 died possessed of the said messuage &c; and the defendant as executrix to him entered into the said messuage &c and was and still is possessed thereof, the plaintiff being seised of the reversion. And he the plaintiff avers that no part of the premises was or is consumed or impaired by fire; and though the plaintiff hath well and sufficiently performed &c all the covenants and agreements in the said indenture, the plaintiff in fact says that the defendant being possessed of the premises as aforesaid after the death of *John Thomas*, to wit, on the first of *May* 1737 and from thence until the suing out of the original writ suffered the said messuage &c to be very ruinous and not in sufficient tenantable repair for want of necessary amendments and repairs; against the form of the indenture &c; and that therefore the defendant hath not performed the covenant &c, but hath broken the same. Damage 100*l.*

1739.
MUCKLE-
STONE
against
THOMAS.

The

1739.
 MUCKLE-
 STONE
 against
 THOMAS.

The defendant pleads that the plaintiff hath not *at any time since the making of the said indenture* hitherto found allowed and delivered on the said demised premises or any part thereof 5000 slates for and towards the repairing thereof; and this he is ready to verify &c.

The plaintiff demurs generally; and the defendant joins in demurrer.

Draper Serjt. for the plaintiff. *Bootle* Serjt. for the defendant.

It was said for the plaintiff that the word "being" implied that the plaintiff had provided at the time of the indenture 5000 slates, otherwise the expression would have been "being to be found". That if the words would not admit of this construction, yet that finding the slates could not be considered as a condition precedent, but as a mutual covenant; and if so, the nonperformance of that would not excuse a nonperformance on the part of the defendant. That there is no difference between saying "the landlord finding" and "being found by the landlord"; and the former will certainly amount to a covenant in the same manner as "yielding and paying". That besides the action is not brought against the person himself for nonperformance of that part of the covenant, but against the assignee not on a breach by her testator but upon a breach by herself of another part of the covenant, to which this has no relation; and the defendant has only pleaded that he (the plaintiff) did not deliver any slates after the making of the indenture.

If was said for the defendant that this must be considered as a condition precedent, or at least as a restriction or qualification of the covenant on the part of *John Thomas*; that it was the same as if he had said "provided"; and that the plaintiff ought to have averred that he had provided and delivered these 5000 slates, otherwise he could not maintain this action.

For the plaintiff were cited 1 *Lev.* 155; *Clapham v. Moyle*; 1 *Rol. Abr.* 416. pl. 15. *Godbolt* 70; *Barker v. Fletwell*.—
 For the defendant 1 *Rol. Abr.* 518, C. pl. 2 & 3; 1 *Lutw.* 394.
Brown

Brown and Walker, Hob. 42; and Cro. Jac. 645, Slater v. Stone.

1739.
MUCKLE-
STONE
against
THOMAS.

We were all of opinion that the word "being" did not necessarily imply that the plaintiff had provided the slates: if he had, the words "having been" would have been more proper. But that "being" is a middle word, which might admit of both significations.

We were of opinion that this ought rather to be considered as a covenant than a condition precedent (a). But that however in this case the plea of the defendant was not good for several reasons;

1st, Because it only said that the plaintiff had not found and delivered any slates after the making of the indenture, whereas he might have found and delivered them before.

2dly, Because this is an action against the defendant as assignee on another part of the covenant *for not keeping the premises in repair*, and not on a breach by the testator in his lifetime, (who, as appears by the pleadings lived until long after the 1st of June 1721,) *for not putting the premises in repair* before that time, to which only this finding of slates relates. For supposing the testator put the premises in repair before the 1st of June without requiring the slates, (and we ought rather to presume that he did at this distance of time,) his executrix was certainly obliged to keep them in repair; and if that were not the case, the defendant ought to have pleaded specially that her testator did not put them in repair by reason that the plaintiff did not find the slates, and that therefore she was not obliged to keep them in repair. As to the objection to the declaration, we were of opinion that if an averment were necessary, which we doubted, yet that this being an affirmative covenant on the part of the plaintiff, a general averment of the performance of all covenants was sufficient.

So, *per Curiam*,

Judgment for the plaintiff (b)."

(a) Vid. *Acherley v. Vernon*, *post*, and the cases there referred to in the notes.

(b) *Thomas v. Cadwallader*, *post*, Mich. 18 Geo. 2.

1739.

E. 12 G. 2.
Saturday,
May 26th.

A. DANBY Assignee of MARY DAWSON, Devisee
of MATTHEW DAWSON, *against* CHRISTOPHER
GREGG (a.)

[Hil. 12 GEO. 2. Rol. 1844, 5.]

Covenant to
levy a fine of
certain lands
in the town-
ship of A. in
the parish of
B. on the
request and
at the costs
of the gran-
tee: breach
assigned that
the grantor
refused to
acknowledge
a fine (ten-
dered to him)
of lands in
the parish of
B.—

Plea that the
note of the
fine tendered
comprised
other lands
in B. than
those con-
tained in the
covenant, of
which the
grantor was
seised; and
held a good
plea.
7 Mod. 292.
S.C.

“COVENANT. The plaintiff sets forth an indenture dated 9th of *March* 1705 between the defendant and *Margaret* his wife and *Matthew Dawson*; whereby the defendant in consideration of 155 *l.* in hand paid enfeoffed *Matthew* of the tenements by the name of several closes, (describing them,) all which said closes lands grounds and premises were situate lying and being within the township fields and territories of *Ilton* in the county of *York*, to hold the same to *Matthew Dawson* his heirs and assigns for ever, to the use of him his heirs and assigns for ever. And *Christopher Gregg* covenants for himself his heirs executors and administrators with *Matthew Dawson* his heirs and assigns that he the said *Christopher Gregg* and *Margaret* his wife, their heirs and assigns, and every other person &c, should at any time after that time upon reasonable request and at the charge in the law of the said *Matthew Dawson* his heirs or assigns make suffer and execute or cause to be made suffered and executed all and every such further and lawful act and assurance in the law for the further assuring of the premises and every part thereof, be it by matter of fact or record or otherwise, as by the said *Matthew Dawson* his heirs or assigns or their counsel learned in the law shall be required, so as such persons to make such further assurance shall not be obliged to travel farther than the Castle of *York* for the doing thereof; which fine or fines &c should be and enure to the uses of the said

(a) This case is reported in 5 *Vin. Abr.* 140. pl. 55.; but there are two mistakes in the facts in that report; 1st, That the question arose on a covenant of the wife before marriage; and 2dly, That the defendant was seised of other lands in *Masbam* in right of his wife: according to the Paper Book it appears that the case

arose on the covenant made by the husband that the husband and wife would make any further assurance &c, and that the husband was seised of the lands comprised in the covenant as well as those mentioned in the plea in his demesne as of fee, not in right of his wife.

indenture.

indenture. That *Matthew Dawson* entered by virtue of the said feoffment and was seized; and on the 12th of *November* 1717 made his will, and devised the premises to *Mary Dawson* and her heirs, and died seized the same day; by virtue of which devise the said *Mary* entered into the premises and was seized; and being so seized by indentures of lease and release bearing date the 24th of *March* 1737 and 25th of *March* 1738 in consideration of 962*l.* conveyed the premises to the plaintiff and his heirs, by virtue whereof he was and still is seized in fee; and afterwards after the making of the said indentures of lease and release and before the suing out of the original writ, *viz.* on the 26th of *April* 1738, for the further assuring of the premises to the plaintiff and his heirs according to the said covenant he at his own charges did cause to be written and engrossed a note of a certain fine to be acknowledged by the said defendant and his wife of the premises, which note is set forth in the declaration and is of several parcels of land in the parish of *Masbam* in the county of *York*; and that he did then and there cause the same to be shewn and tendered to the said defendant and his wife before two commissioners (naming them) duly and lawfully authorised to take such acknowledgments &c then and there present and ready to take the same, and in their presence did request the defendant and his wife to acknowledge the same, such acknowledgment being a reasonable act for assuring &c. And the plaintiff assigns as a breach that the defendant and his wife did not acknowledge the same, but refused so to do. Damage, 400*l.*

1739.

DANBY
against
GREGG.

The defendant saith that he was always ready and willing to make any further and lawful assurance according to his covenant, but pleads that at the time of tendering the said note of a fine he was and is seized in fee of divers other lands &c in the said parish of *Masbam*, *viz.* of twenty-five acres of land fifty acres of meadow and twenty acres of pasture, no part whereof is contained in the said indenture of feoffment; and the said note of the said fine so tendered did contain more lands than are comprised in the said indenture, *viz.* nine acres and one rood of land, three acres and one rood of meadow, and nine acres and one rood of pasture, more than are comprised in the said indenture; for which reason the defendant and his wife refused to acknowledge

ledge

1739.

DANBY
against
GREGG.

ledge the said note of the said fine; and this the defendant is ready to verify.

The plaintiff demurs generally, and the defendant joins in demurrer.

Serjt. *Bootle* for the plaintiff cited *Moor* 810; 1 *Bulstr.* 90; *Cro. Jac.* 251; *Boulney v. Curteys*; 7 *J.* 1., where the note of the fine tendered was of three messuages, and the defendant pleaded that two more messuages were comprised than he covenanted to be assured, and the plea was overruled by the whole Court.

Serjt. *Draper* for the defendant cited the case of *Wilson v. Welsh*, 2 *Bulstr.* 317, and 1 *Rol. Rep.* 103, 117; 12 *J.* 1.; in which he said the contrary was determined, and the case in *Cro. Jac.* 251, held not to be law. He also cited *Tindall's* case, *Latch* 186, to shew that the defendant was not obliged to acknowledge a fine before commissioners.

We were all of opinion that the plea was good; for though there are generally more acres of land put in a fine than are intended to pass, that the fine may be sure to comprehend enough, and therefore this alone would not be a sufficient objection, yet the plaintiff ought not to have added a new place, since there could be no necessity for that. For the covenant only extends to lands in the *township of Ilton*, and the fine is of lands in the *parish of Masbam*, in which the defendant expressly avers that he has other lands. And in the case in *Cro. Jac.* 251, the defendant did not aver that he was seised of any other messuages. Besides this is stronger, being in the case of a wife, who may be barred of her dower by this means.

As to the objection that they were not obliged to go before commissioners to acknowledge the fine, we did not rely on that. But my Brothers *Denton* and *Fortescue A.* seemed to be of that opinion: But I and my brother *Wm. Fortescue* thought otherwise.

Judgment for the defendant nisi; the last day of the term adjourned until the first day of *Trinity* term at the desire of Serjt. *Wright*, who admitting then that he had no cause to shew, judgment was made absolute."

1739.

ROGER ACHERLEY *against* BOWATER VERNON (a).

E. 12 Geo. 2.

Monday
June 4th.

THE opinion of the Court was thus delivered by

Willes Lord Chief Justice. "Debt. The cause was tried before Lord Chief Justice *Eyre* in London 24th February, 8 Geo. 2. Verdict for the plaintiff for 1900 *l.* subject to the opinion of the Court of *B. C.* on the point of law arising on the will and codicil of *Thomas Vernon Esq.*; and therefore so much of the will and codicil as related to the point in question was directed to be inserted in the case.

The action was brought by the plaintiff as administrator of his wife *Elizabeth Acherley* deceased, and was founded upon the statute 32 Hen. 8. c. 37. entitled an act for recovery of arrears of rent by the grantees of tenants in fee-simple, which extends to the administrators of tenants for life of rents, and was brought by the plaintiff for the arrears of an annuity of 200 *l.* due to his said wife, which was devised to her by the will and codicil of *Thomas Vernon*.

The case sets forth that the said *Thomas Vernon* by his will, bearing date the 17th of June 1711, gave unto his sister *Elizabeth Acherley*, then the wife of *Roger Acherley*, one annuity or rent-charge of 200 *l.* a-year to be paid to her half-yearly out of the rents and profits of his real estate to her own hands for her separate use, exclusive of her present or any after-taken husband, and in case she shall happen to survive my wife, my will is that the 200 *l.* per annum be from the time of my wife's decease made up the sum of 400 *l.* per annum during the life of my said sister for her sole and separate use. And he by his will gave to his niece *Letitia Acherley* the sum of 1000 *l.* at her age of 18 or marriage which should first happen, provided she married with the consent of her father and mother and his widow or of such of them as should be then living: but if she married without such consent, he gave her but 100 *l.* and the 900 *l.* was to cease and fall into his

A. by will gave a rent-charge to his sister, payable half-yearly, and said he gave it to her in lieu and satisfaction of all claim she might have on his real or personal estate and upon condition that she release all right and claim thereto to his executors and trustees; the sister lived several years without executing any release; held that the husband of the sister was not entitled to the arrears of the annuity. —The release was a condition precedent: but if it were only a condition subsequent, it ought to have been performed in a reasonable time; within six months, or at all events during her life.

(a) *Com. Rep.* 513; and *Fort.* 188, 212, 426; and 3 *Bro. Parl. Cas.* 107. for other points in different cases between the same parties.
S. C.—See also *Com. Rep.* 381; 1 *P. Wms.* 783; 9 *Mod.* 68; 10 *Mod.* 518; 2 *Equ. Cas. Abr.* 209 pl. 2; 2 *Barnard.*

R r

personal

1739.
ACHERLEY
against
VERNON

personal estate &c. And after several other devises and legacies, which are immaterial to the point in question, he gave and bequeathed all the rest and residue of his real and personal estate, all his debts legacies and funeral expences being first paid and satisfied, unto his brother *Roger Acherley* and four other trustees their heirs executors and administrators upon special trust and confidence in them reposed that (the annuity and annual rents before devised to his wife and sister and other persons therein for that purpose before named being first duly paid out of the rents issues and profits of his real estate whereof he should die possessed whether freehold or leasehold, and after payment of all his debts and all legacies that he had or should by his said will or by any codicil or codicils give or devise, his funeral charges and the charges of the probate of his said will and administration being paid and satisfied,) the said trustees and the survivor and survivors of them and the heirs and assigns of such survivor should lay out the rest and residue of his personal estate in lands in such manner as is therein directed, and that the same when purchased should be settled to such uses as is therein also directed, *but should be subject to such of the annuities given by the said will as should not be then determined.*

And the said *Thomas Vernon* by his codicil, dated 2d of *February* 1720, ratified and confirmed his said will (except in the alterations therein mentioned), and in the first place directed that the portion or legacy thereby given to his niece *Letitia Acherley* be made up in the whole 6000*l.* and payable to her at her age of 21 or marriage, which should first happen; and he recommended it to her to take her own mother's and his wife's consent to the marriage, if they should be then living. Then follow these words on which the question depends; "But my mind and will is that what I have so given to my sister and niece be by them accepted and taken in lieu and satisfaction of all they or either of them might claim out of my real or personal estate, and upon condition that they release all right and title thereunto unto the executors and trustees in my will named. And having thus provided for my sister and niece, I devise all the lands by me purchased since the publishing of my will (and he had in fact purchased several estates afterwards) to the same uses as I have given my manor of *Hanbury* and the bulk of my estate by my will."

Mr.

Mr. *Vernon* died 5th of *February* 1720; after whose death the said *Roger Acherley* and *Elizabeth* his wife in right of the said *Elizabeth* were seised of the said yearly rent devised to the said *Elizabeth* as aforesaid in their demesne as of freehold by virtue of the said gift and devise, and the defendant entered on the manor and other the lands chargeable, and was and ever since has been tenant of the demesne thereof. The action is brought for 1900*l.* for nine years and an half arrears of the said annuity of 200*l.* due on the 5th of *February* 1731 in the lifetime of the said *Elizabeth Acherley* and also in the lifetime of the said *Mary* the wife of *Thomas Vernon*. *Elizabeth* died 3d of *May* 1732, and she never made any release unto the trustees or executors in the testator's will named.

1739.
 ACHERLEY
 against
 VERNON.

The question which arises upon this case (a), and which was reserved for the opinion of the Court, is whether the plaintiff, as administrator of his wife *Elizabeth*, is entitled to recover the arrears of this annuity or any part thereof, his wife *Elizabeth* never having executed any release either of the real or personal estate of the testator to the executors and trustees according to the condition in the codicil. And this will depend upon these two questions;

1st, Whether it be a condition precedent or subsequent; if it be a condition precedent, the plaintiff is certainly entitled to nothing, because nothing ever vested in *Elizabeth*, she not having performed the condition.

2dly, But supposing it to be a condition subsequent, the next question will be whether it ought not to have been performed in a reasonable time, or at least some time in the life of *Elizabeth*.

In respect to both these questions, I shall in the first place consider what was the intent of the testator, and in the next place what construction may be put on the words of the codicil according to the rules of law and grammar.

And we are of opinion that the intent of the testator is plain and clear; that his sister and her daughter should have no part either of his real or personal estate but what he has given them

(a) This case was argued four several Justice *Reeve*, and twice after Lord Chief times; twice in the time of Lord Chief Justice *Willes* presided in this Court.

by

1739.
 ACHERLEY
 against
 VERNON.

by his will and codicil; that they should accept of that as a full provision for them and in full lieu and satisfaction of all their claims and demands whatsoever either out of his real or personal estate, and that the person to whom he had given his estate with an intent to preserve his name and family should enjoy it in peace and quietness, without any disturbance from his female heirs. Having thus (says he) provided for my sister and niece, I devise all my estate &c. And this being his plain intent, he could never intend that his heirs, for whom he had so provided, should be at liberty to dispute the devisee's right for several years together and yet all the while to insist on the payment of their annuity. He therefore certainly intended an immediate release, or at least that his sister should receive no part of the annuity until she had executed a release.

This being his plain intent, I will in the next place consider whether or not such a construction can be put upon the words of the codicil according to the rules of law and grammar as is agreeable to the intent of the deviser. I must own that whenever I am fully satisfied of the meaning and intention of the testator, I shall always endeavour, if possible, to put such a construction upon the words of a will that his intent may not be frustrated. And with that inclination I shall consider the words of this codicil, which plainly create a condition; "But my mind and will is that what I have so given to my sister and niece be by them accepted and taken in lieu and satisfaction of all they or either of them might claim out of my real or personal estate, *and upon condition that they release all right and title thereunto* unto the executors and trustees in my will named &c." My Brothers are of opinion that the words of this codicil are sufficient to create a condition precedent. And though I doubted of this at first, I am inclined to be of the same opinion, though I am not so clear as to this point as I am in respect to the second; and if I agree with them in either point, the consequence is that the plaintiff cannot recover.

I know of no words that either in a will or deed necessarily make a condition precedent, but the same words will either make a condition precedent or subsequent according to the nature

of the thing and the intent of the parties (a). If therefore a man devise one thing in lieu and consideration of another, or

1739.

ACHERLEY
against
VERNON.

(a) So *Affburst J.*, in delivering the opinion of the Court in the case of *Hotham v. The East India Company*, 1 Durnf. & East 645, said "There are no precise technical words required in a deed to make a stipulation a condition precedent or subsequent; neither doth it depend on the circumstance whether the clause is placed prior or posterior in the deed, so that it operates as a proviso or covenant. For the same words have been construed to operate as either the one or the other according to the nature of the transaction." This question has more frequently arisen on the construction of contracts than of wills. And all the determinations are founded on the same ground, the intention of the parties as it is to be collected from the whole instrument, without considering the order in which the respective covenants are placed; or, as more accurately expressed by Lord Mansfield in *Kingston v. Preston*, Dougl. 690, "The dependence or independence of covenants is to be collected from the evident sense and meaning of the parties; and, however transposed they may be in the deed, their precedence must depend on the order of time in which the intent of the transaction requires their performance."

The cases on this subject may be arranged in three classes;

1st, Those of independent covenants, where one party may maintain an action on the covenant to be performed by the other, without averring performance of the covenants on his own part, and to which action the defendant cannot plead nonperformance of the plaintiff's covenants in bar.

2dly, Those of dependent and concurrent covenants, where the act of each party is to be done at the same time.

3dly, Those of dependent covenants or conditions precedent, where the performance of one act depends on the prior performance of another by the other party, and where until the prior act is done no right is vested in the party who ought to perform it, nor is the other party liable to an action on his covenant. And in both the

last cases the party suing must aver that he has performed, or was ready to perform, or was prevented by the other party performing, the covenants on his part, and the defendant may plead nonperformance by the plaintiff in bar of the action.

Of the first kind are the following modern cases; *Blackwell v. Nash*, 1 Str. 535; *Wyvil v. Stapleton*, ib. 615; *Merritt v. Rane*, ib. 460; *Dawson v. Myer*, 2 Str. 712; *Martindale v. Fisher*, 1 Wils. 88; *Boone v. Eyre*, 2 Bl. Rep. 1312; *Bach v. Owen*, 5 Durnf. & East 409; *Campbell v. Jones*, 6 D. & E. 570; *Boone v. Eyre*, 2 H. Bl. Rep. C. B. 273. n. a. and *Terry v. Duntze Bart.* 2 H. Bl. Rep. 389.

The following fall within the second class; *Lock v. Wright*, 1 Str. 569; *Jones v. Barkley*, Dougl. 684; *Kingston v. Preston*, cited in Dougl. 688; *Goodisson v. Nunn*, 4 Durnf. & East 761; *Lord Aldborough v. Lord Newhaven* there cited 763; *Morton v. Lamb*, 7 D. & E. 125; and *The Duke of St. Albans v. Shore*, 1 H. Bl. Rep. C. B. 270.

And these cases are of the last description; *Hesketh v. Gray*, Say. 185; *Collins v. Gibbs*, 2 Burr. 899; *Hotham v. The East India Company*, 1 D. & E. 638; *Davis v. Mure*, and *White v. Middleton* cited in 1 D. & E. 642; *Pole v. Harrobin*, there cited 644; *Campbell v. French*, in error, 6 D. & E. 200, (reversing the judgment in C. B. 2 H. Bl. 163;) *Porter v. Shephard*, in error, 6 D. & E. 665, (affirming the judgment in C. B. ;) *Worsley v. Wood and Others*, in error, ib. 710, (reversing the judgment in C. B. 2 H. Bl. 574;) *Oldman v. Bewicke*, 6 D. & E. 714, and 2 H. Bl. 577. n. a.; and *Routledge v. Burrell*, 1 H. Bl. 254.—

The more ancient cases are not here collected, because they are to be found in the different abridgments. If there be any apparent contradiction in any of these determinations, it has arisen not from a denial, but a misapplication, of the principle in the particular instance, since the Courts have in all the cases professed to decide on the same ground.

S f

agree

1739.
 ACHERLEY
 against
 VERNON.

agree to do any thing or pay a sum of money in consideration of a thing to be done, in these cases that which is the consideration is looked upon as a condition precedent. So is the case of *Peters v. Opie*, 1 *Ventr.* 177. and 1 *Saund.* 350. If a man agree to pay a sum of money to another pro labore suo in pulling down a house, the pulling down of the house is a condition precedent. So is the case of *Thorpe and Thorpe*, 1 *Salk.* 171, where a man agreed to pay a sum of money to another *be releasing the equity of redemption* in certain lands. And so is the case of *Turner v. Goodwin*, adjudged by Lord *Macclesfield* and the rest of the Judges of *B. R.* upon great consideration, *P. 13 Anne*, in which case *Goodwin* (a) was to pay *Turner* 1500*l.* *be assigning a judgment*. In all which cases it was holden that the party who was to receive the money was not entitled to demand it until he had performed that which was the consideration of the payment, and which was considered in all these cases to be in the nature of a condition precedent. It was said indeed in the case of *Thorpe and Thorpe* that if a particular day be appointed for payment and the day will happen before the thing can be performed, an action may be brought for the money before the thing is done, and in that case it must not be considered as a condition precedent: but if the thing can be done before, it must. It is likewise held in *Hob.* 41. and several other books that if a man has no other remedy for the thing which is to be done in consideration of the payment but the stoppage of the money, in that case he is not obliged to pay it until the thing is done. And for this reason it has been always holden that if an annuity be granted pro consilio impendendo, if the grantee refuse counsel the annuity ceases. So likewise if it plainly appear to be the intent of the testator that the devisee shall not have the benefit of the devise unless he perform a certain act enjoined him by the deviser, this is a condition precedent; and the devisee shall have no benefit of the devise until he perform it, even though the condition be never so unreasonable if it be not illegal or impossible; for *cujus est dare ejus est disponere*. A man may dispose of his estate at his own will and pleasure and upon what terms he thinks fit; and men's wills (as Lord *Hale* says) are the laws that

(a) Vid. *Fort.* 145. 10 *Mod.* 154; 190; and 222. *Gillb. Cas. in Law and Eq.* 40.

private men are allowed to make concerning their estates, and courts of justice are bound to carry them into execution. It is upon this foundation that the great case of *Bertie v. Falkland* (a) was adjudged, which was so well considered and so solemnly determined, where a devise to an infant of but ten years of age *in case* she married Lord *Guildford* within three years became void on nonperformance of the condition, though she was an infant, and though the performance of it was not in her power; and the reason given for it was because it was a condition precedent. And it was said in that case that even a court of equity can give no relief in case of a condition precedent, though it becomes impossible by the act of God. The case of *Fry and Porter* (b) is founded on the same reason.

1739.
 ACHERLEY
 against
 VERNON.

Now I will try the present case by the reasons of these several cases. And, first, this annuity is plainly granted in consideration of the release; so are the express words of the codicil. Nor has the devisee of Mr. *Vernon* any remedy to obtain such release but by stopping the payment of the annuity. And it is as plain, I think, or rather plainer than in the case of *Bertie* and *Falkland*, that Mrs. *Acherley* should not have the annuity unless she perform the condition. The words in the one are "*in case* she marries"; in this "*upon condition* that she release"; which is certainly at least as strong if not a stronger expression than the other. And there is no pretence to say in this case that she could not perform the condition before the time of the payment of the annuity, for the first payment was not to be until six months after the testator's death, and she might as well release her right in six months as at any future time. Besides the particular manner of penning this clause affords another very strong argument that this was intended to be a condition precedent; for all the words are in the present tense. He wills that the annuity *be* accepted in lieu and satisfaction and upon condition that *she release*; which is just the same as if he had said "I give her the annuity *she releasing*," which expression has always been holden to make a condition precedent, as appears from the cases which I have already mentioned, and from the case of *Large and Cheshire*. 1 *Vent.* 147, which is a

(a) Vid. 2 *Vern.* 333; *Salk.* 231; | (b) 1 *Mod.* 300.
 12 *Mod.* 182; and 2 *Freem.* 220.

1739.
 ACHERLEY
 against
 VERNON.

case in point to this purpose. A man agreed to pay 50*l.* to J. S. *he making him a good estate in certain lands*: it was holden to be a condition precedent, and that J. S. could not demand the money until he had made him a good estate in these lands.

I will in the next place consider the objections that have been made against this construction.

1st, It was said that the devise of the annuity is by the will, and the condition is only in the codicil which was made nine years afterwards, and therefore it must be a condition subsequent. But there is no weight in this objection; for the will and codicil which confirms the will and is declared to be part of it must be considered as one and the same instrument; and there is no priority or posteriority in a will as there is in a deed, but every part of a will must be taken and considered together.

2^{dly}, It was said that if this be said to be a condition precedent, it was an impossible condition and therefore void, because the wife could not make an effectual release unless her husband joined with her in a fine, and he might refuse to do so. But the foundation of this argument is false; for admitting that she could not make an effectual release unless her husband joined with her, it is not therefore an impossible condition but only a condition which it was not entirely in her power to perform. And there are a multitude of conditions in the books which are held to be good, though it was not in the power of the party to perform them without the consent or assistance of another. If this were an objection what would become of all the conditions to marry? for it is in no one's power to marry whom he pleases. Besides it is not very clear that it was out of Mrs. *Acherley's* power during her coverture to perform this condition. For a feme covert may levy a fine without her husband, and it will bind her and her heirs if the husband do not enter and avoid it; as is expressly held in 7 *Hen. 4.* 23; 11 *Hen. 4.* 25. *b.*; in *Mary Partington's* case 10 *Co.* 43. *a.*, and several other cases (a). And if in the present case Mrs. *Acherley* had levied a fine and her husband had endeavoured to avoid it by entry

(a) *Bro. Abr. "Fines,"* pl. 33; *Hob.* | —See *Moreau's* case, 2 *Bl. Rep.* 1205.
 225; the *Earl of Bedford's* case, 7 *Co.* 8; |

after his wife had accepted of the annuity, I have no doubt but that a court of equity would have granted an injunction against him.

1739.

ACHERLEY
against
VERNON.

3dly, The next objection was that the estate itself is not given to the trustees until after the annuities are paid and satisfied, and therefore they were not capable of accepting a release from Mrs. *Acherley* until after the annuity was at an end. But this is to put such a construction on the will as would make the whole inconsistent, and would make Mr *Vernon* (who was a very great and learned man) speak the greatest nonsense imaginable; but this objection arises only from the inaccurate penning of one clause in the will. But the words *after the annuities paid and satisfied* plainly mean only that the estate shall be subject to the payment of the annuities; for he says afterwards that the estate shall be enjoyed by those to whom he has given it subject and liable to these annuities, which it could not be if the estate itself were not to commence until all the annuities were discharged.

4thly, The next objection is still of less weight, that he could not intend that Mrs. *Acherley* should release all her right immediately, because if she did she would release the annuity itself; there is some conceit but very little argument in this; for to be sure she would only be obliged to release all her other claim on the estate, and not this charge of the annuity, which is the consideration of her giving the release.

5thly, The last objection was that the same condition in the same sentence and by the same words is annexed to *Letitia* the daughter's legacy, and that that must be a condition subsequent, and therefore this must be so too; because the legacy of 6000*l.* is given to her payable at her day of marriage or age of twenty-one, and as she might marry before twenty-one she would then be entitled to her legacy and yet would be incapable of giving a release. And this was the objection (I own) that stuck with me and created my doubt: but I think it will receive an answer. For an infant before twenty-one may levy a fine, and if he do not avoid it during his infancy, it will bind him for ever; so it was held in 2 Co. 58. a. *Beckwith's* case, and in several other cases,

1739.
 ACHERLEY
 against
 VERNON.

cases, and is undoubted law (a). Now if *Letitia* had accepted the money at her day of marriage before twenty-one and levied a fine and had afterwards endeavoured to avoid it during her nonage, the Court of Chancery would certainly have hindered her by injunction, which Mr. *Vernon* well knew and therefore might very well intend this to be a condition precedent. And I am the more inclined to think that he did so by the alteration that he made in his codicil; for he has given her the 1000 *l.* by his will, to which he did not annex this condition payable at the age of eighteen: but when he gave her 6000 *l.* by his codicil to which he annexed this condition, he made it payable at twenty-one. Though therefore I doubted at first, upon consideration I am inclined to be of the same opinion with my Brothers that the condition annexed to Mrs. *Acherley's* annuity was a condition precedent.

Secondly.—But supposing it to be a condition subsequent, I am still of opinion that the plaintiff cannot recover, for that it ought to be performed in a reasonable time. And I am rather inclined to think that it ought to have been performed at the end of six months when the first payment of the annuity became due. But I am clearly of opinion that it ought to have been performed before it became impossible; for to say that it is now become impossible by the act of God, and that it is therefore void if a condition subsequent, is a mere fallacy. If indeed it had been directed to be done on a particular day, and she had died before that day, the argument would have had great weight. But she might and ought to have performed it immediately, if she insisted upon having her annuity; and therefore it was her own laches that it was not done before, of which she shall not take advantage. To say that she had her whole lifetime to perform it in is, I think, most absurd; for then she might contrary to the express directions of the testator dispute the devisee's right to the estate for many years and yet all along enjoy the benefit of her annuity. If I were at liberty to take notice of any thing that is not in the case, she and her

(a) *Parker v. Primate*, 3 *Keb.* 480. | 12 *Co.* 122; 124. S. P.—See also 2 vol. *Herbert Perrot's case*, 2 *Ventr.* 30; | *Parl. Roll.* 50 *Edw.* 3. p. 342.
Moor 22; Sir *W. Jon.* 390; *Winch* 103, 4;

husband

husband did in fact controvert the devisee's right to part of the estate for many years together.

1739.
ACHERLEY
against
VERNON.

It was said that there ought to have been a request on the other part before Mrs. *Acherley* was obliged to execute a release: but I think not; for until she demanded the annuity they might not think it worth their while to demand a release: but it was her business to do the first act in order to entitle herself to the annuity.

Another argument was made use of a little inconsistent with this; for it was said that as Mr. *Vernon* had given away all the rest of his real and personal estate, and had undoubtedly a right to do so, Mrs. *Acherley* had no right to release, and as her release would have signified nothing the condition therefore was entirely immaterial. But it is plain that the testator thought it material, and it is as plain from what has happened that he judged right. However if she had had no pretence of right, as the testator gave her her annuity upon these terms, she was equally obliged to perform the condition, as was expressly holden in the case of *Doughty v. Neal*, 1 *Saund.* 215, where the party who was directed to release had no pretence of right.

Upon the whole we are all of opinion that the condition of the devise of this annuity not having been performed by Mrs. *Acherley*, and it being now become impossible that it ever should, the consequence is that the plaintiff as representative of Mrs. *Acherley* cannot recover any part of the arrears of this annuity.

According therefore to the rule entered into at the trial the verdict given for the plaintiff must be set aside, and the plaintiff must pay the costs of a nonsuit: but I hope as the suit is between near relations the defendant will not insist on any costs".

1739.

T. 12 & 13
G. 2.Tuesday,
July 10th.

The testator
F. Eagle de-
vised thus,
“to my bro-
ther Thomas
for life, then
to the nearest
of my rela-
tions, st. to
B. the son of
Thomas and
his heirs for
ever, and
after their
deceases to
the nearest of
kindred to
me, first male
and then fe-
male; the
house &c to
descend to
the name of
Eagle, to be
kept up as
long as the
world shall
endure, and
never to be
sold”; held
that B. the
son of Tho-
mas took a
fee.

7 Mod. 296.
8vo. ed. S.C.

JOSEPH PRESTON on the Demise of PETER EAGLE
against MARY FUNNELL.

THE following opinion of the Court was delivered by

Willes, Lord Chief Justice. “Ejectment. This comes before the Court on a case which was made by my Brother *Denton* in a cause tried before him at *Norwich* assizes, which case is as follows.

Francis Eagle, being seised in fee of the estate in question, being a copyhold estate held of the manor of *Mulbarton* in *Norfolk*, surrendered the same on the 18th of *January* 1689 to the use of his will, and then devised it in these words; “I give unto my brother *Thomas Eagle* all my goods chattels household stuff money plate rings estates houses lands and tenements, and all that I have in the world whatsoever both within doors and without, for and during his life, my debts funeral charges and legacies being first satisfied and discharged, and then the houses and lands to the nearest of my relations (that is to say) to *Thomas Eagle* my brother’s son to him and his heirs for ever, and after their deceases to the nearest of kindred to me, first male and then female, which said lands and houses are never to be sold, neither freehold or copyhold, and to be kept up in good repair; and this house wherein I now dwell is to descend to the name of the *Eagles* and to be kept up as long as the world shall endure and never to be sold”. After the death of the testator *Thomas* his brother entered, and was admitted pursuant to the will, and died. After his death at a Court held on the 24th of *October* 1709 *Thomas* the deviser’s brother’s son was admitted in fee to him and his heirs by virtue of the said will, and afterwards at a Court held on the 28th of *March* 1715 for a valuable consideration he surrendered and sold the premises to *James Charles* and his heirs, who was admitted at a court held on the 14th of *May* 1716 and died seised; and *Richard Charles* his son and heir, who is now living, was admitted on the 28th of *October* 1723, and has ever since been in quiet possession, and the defendant *Funnell* is tenant to this *Richard*. *Thomas Eagle*

the son died in *June* 1732, without suffering a recovery of the premises in the court of the manor, though such recoveries are customary there to bar the issue in tail or those in remainder. *Peter Eagle*, the lessor, is son and heir to the last *Thomas Eagle*.

1739.
PRESTON
dem. EAGLE
against
FUNNELL.

The question is whether *Thomas Eagle*, the testator's brother's son, took an estate in fee or in tail by the devise; if an estate in fee, then it is for the defendant, if an estate in tail, then for the plaintiff (a).

The rule of law is plain and clear; and though the words of the devise seem a little intricate at first view, yet when they come to be considered, they will not, I think, admit of much doubt.

If the dispute were between the heir at law and the remainderman, I should think it a very doubtful case, and should think that a court of law ought to be very cautious how they carried such an absurd devise into execution, especially when it was plainly to create a perpetuity. But the question is not now whether the devise in remainder be good or not, it having certainly never yet taken place, but whether or no this devise over does not plainly shew that the testator by these words "*heirs of Thomas Eagle*" meant only "*the heirs of his body*."

Now the rule of law is that if the first devisee cannot die without heirs so long as there are any of those persons in being to whom the estate is devised over, in that case the first devisee shall only have an estate-tail, for it is plain that by the word "*heirs*" he must mean "*heirs of his body*", otherwise the devise over would be vain and nonsensical. But if the devise over be to a stranger, in that case the first devisee takes an estate in fee; because in that case the meaning of the testator is doubtful, for he might be mistaken in the law and might think that he could limit a fee upon a fee which he could not by the rules of law,

(a) This case was first argued in *July* in this term by *Eyre* King's Serjt. for the former and *Belfield* Serjt. for the latter.
Hilary term 1738 by *Umlin* Serjt. for the plaintiff and *Wright* King's Serjt. for the defendant, and again on the 4th of

1739.

PRESTON
 dem. BAGLE
 against
 FUNNELL.

and consequently such remainder is void. This is now the settled rule of construction of wills of this sort, and was never doubted in any case that I can meet with, except the case of *Hearn v. Allen* in *Cro. Car.* 57; in which case, though the judgment of the Court was against this rule, yet *Yelverton J.* and *Croke J.* both very great Judges adhered to it. And this rule is adhered to in all the other cases that I can find as well precedent as subsequent (a). So is the judgment in the case of *Webb v. Herring*, *Cro. Jac.* 416., and 3 *Bulstr.* 192 (b). The case of *Parker v. Thacker*, 3 *Lev.* 70. The case of *Nottingham v. Jennings*, *Tr.* 12 *Will. B. R.* reported in 1 *Salk.* 233 (c). But I have a fuller manuscript (d) than the report in *Salkeld*, where it appears to be a case made by Lord Chief Justice *Holt* on a trial before him, and he said that he should have had no doubt but that a majority of the Judges in the case of *Hearn v. Allen* were of a contrary opinion. But the Court there determined against that authority upon the first argument. And in the

(a) See 1 *Roll. Abr.* 836. pl. 6; *Soule v. Gerrard*, *Cro. Eliz.* 525; *Tilly v. Collier*, 2 *Lev.* 162; *Allen v. Spendlove*, 1 *Freem.* 74; *Law v. Davis*, 2 *Str.* 849; *Pickering v. Towers*, *Ambl.* 363; *Tyte v. Willes*, *Cas. temp. Talb.* 1; 2 *P. Wms.* 370; *Goodright v. Dunham*, *Dougl.* 266; *Denn d. Geering v. Shenton*, *Cowp.* 410; *Doe d. Hanson v. Fyldes*, *Cowp.* 833; *Morgan v. Griffiths*, *Cowp.* 234; *Porter v. Bradley*, 3 *Durnf. & East* 145; *Doe v. Perryn*, *ib.* 491; *Ives v. Legge*, *ib.* cited in n. 488.—See also *Ginger d. White v. White*, *post. Tr.* 1742, and *Goodright d. Goodridge v. Goodridge*, *post. Mich.* 1742. And for the purpose of this rule a devise over to a person of the half blood of the first devisee is considered as a devise to a stranger, and consequently the first devisee takes a fee. *Tilburgh v. Barbut*, 1 *Vez.* 89, and 3 *Atk.* 617.

(b) 1 *Roll. Rep.* 398 and 436. S. C.

(c) This case has been since reported in 1 *Ld. Raym.* 568; 1 *P. Wms.* 23; and *Com. Rep.* 82.

(d) The following is probably the manuscript note to which the Lord Chief Justice alluded. "*Nottingham v. Jennings*. In ejectment a case made coram *Ld. Holt* for the resolution of the Court was this;

John Jennings, seized in fee of the lands in question, and having three sons *John*, *Daniel*, and *James*, devises them to *Daniel* and his heirs for ever, and if he die without heirs, then to *John* and his heirs. The deviser dies; *Daniel* enters, and aliens the land by lease and release to the defendant, and dies without issue. *John* is likewise dead, and his heir is lessor of the plaintiff. The single question is whether *Daniel* by this devise had an estate in tail or in fee; and adjudged on the first argument that it was only an estate-tail. For the word "heirs" in this case can signify nothing but "heirs of the body of the devisee": if it had meant simply and properly heirs in fee, the devise over to the brother for want of such heir would be absurd; because so long as the devisee should have a brother, he could not die without heirs in fee; therefore to make the intention of the deviser sensible it is necessary to construe the words to mean heirs in tail. *Webb v. Herring's* case, *Cro. Jac.* 415, 416. is express to this point. And per *Holt*, If the majority of the Judges in *Hearn* and *Allen's* case had not been contrary, I should have made no case of it." MS. Coll. *Willes* Chief Justice,

case

case of *Crumble v. Jones* (a), B. R. H. 7 An. the Court on a special verdict declared this to be the established rule, and adjudged in that case that the first devisee took a fee by the word "heirs", and that the limitation over was void because it was to a stranger, and therefore did not necessarily imply that the testator by the word "heirs" meant "heirs of the body"; for he might think that he could limit a fee upon a fee, and such his intention could not take place according to the rules of law.

Now let us try the present case by this rule, and see whether *Thomas* the brother's son could want heirs so long as the testator had any nearest of kin in being, I mean such as were capable of taking lands by descent; if he could not, then it is an estate-tail, if he could, then it is an estate in fee. And first it was said by the counsel that his brother *Thomas* would be his nearest relation and yet he could never take as heir to his son, and that

(a) "*Crumble v. Jones*, (1) Hil. 7 Ann. 1708, 9. B. R. By special verdict in ejectment it was found that *Anthony Gubb*, being seised of the lands in question, did devise them to his daughter for life, remainder to *A.* the eldest son of his daughter and his heirs, and for want of such heirs remainder to the right heirs of *J. S.*, who was his daughter's husband. The deviser dies, and the daughter; and afterwards *A.* dies without issue, living *J. S.* The plaintiff is lessee of the heir of the deviser, and the defendant of the heir of *A.* the devisee.

"It was agreed that the remainder to the right heirs of *J. S.* failed, for that *J. S.* was alive at the time when the remainder should have taken effect, and consequently had no heirs in whom the remainder could vest. And therefore the question was between the heir of the deviser and the heir of the devisee, whether by this limitation taken together *A.* had a remainder in tail or in fee.

"And it was the clear opinion of the Court that *A.* by this limitation took an estate in fee, and that the limitation over was void; for the limitation is express to

A. and his heirs, and the remainder over for want of such heirs does not necessarily shew that the deviser intended that the estate should pass over for want of heirs of his body, for he might mean for want of heirs in fee; and it is but reasonable that the common and legal construction of words should be taken where it does not appear from a necessary or plain implication that the intent of the deviser was otherwise. If therefore a limitation in a will be to the eldest son of the deviser and his heirs, and for want of such heirs remainder to the second son, who if the first son die without issue is next heir both to his father and brother, in this case the limitation to the eldest son must be understood to be an estate-tail; because the word "heirs" cannot be taken to signify "heirs in fee", when the limitation over for want of such heirs is to the next heir in fee. And for this was cited a case lately adjudged in B. R. between *Nottingham* and *Jennings*. Vid. *Cro. Car.* 57. *Hearn v. Allen*, *Vaugh.* 269, 270; *Cro. Jac.* 416; *Webb v. Herring*." MS. Coll. *Willes*, Chief Justice.

(1) Reported by the name of *Grumble v. Jones*, in 2 *Eq. Cas. Abr.* 300. pl. 15. and in 11 *Mod.* 207. *Aumble v. Jones*, in *Salk.* 238.

therefore

1739.

PRESTON
dem. EAGLE
against
FUNNELL.

1739.

PRESTON
 dem. EAGLE
 against
 FUNNELL.

therefore though the son should want heirs yet the devise over might give the estate to the father. But this argument will not hold, because the devise to the testator's nearest relations is not until after the decease of his brother *Thomas*, to whom he had given an estate for life. It was likewise said that he might have very near relations of the half blood, who yet could not take as heirs to his brother's son. But to this it was answered that as the testator was disposing of lands, he must mean such of his relations as were capable of taking lands by descent and therefore must mean of his whole blood; and I am inclined to be of this opinion, and therefore think that there is no conclusion to be drawn from this.

But there is another contingency, which plainly shews that the testator might have nearest of kin capable of taking by descent, and yet his brother's son might die without heirs; for his brother might marry a second wife and have several children by her, which children would be of the name of *Eagle*, which children would be near relations of the testator and capable of taking by descent, and yet being of the half blood to *Thomas* the present son of the testator's brother could never take as heirs to him.

And I think in this case we should be as desirous as possible to put this construction on the will, both because the defendant claims under a purchaser for a valuable consideration, and because it is plain that the testator intended to create a perpetuity if he could by this devise over, which the law will not permit. If we were to put any other construction on this, we must also construe it to mean "heirs *male &c*"; for the deviser has directed that the estate should continue *in the name of the Eagles*; and if it were to descend to the *daughters*, that would defeat the deviser's intention as expressed in this part of the clause.

We are therefore of opinion that the devise to *Thomas* the son of the testator's brother must be taken in it's legal and natural construction, that consequently he took an estate in fee, and therefore the judgment ought to be for the defendant: but as this comes before us upon a case, the rule of this Court must be according to the rule of *nisi prius*, that the verdict for the

plaintiff be set aside, and the lessor of the plaintiff must pay to the defendant the costs of a nonsuit."

To the above this memorandum was added in Lord Chief Justice *Willes's* Note Book.—*Note*, "J. W. Fortescue absent, but consenting to the judgment."

1739.
PRESTON
dem. EAGLE
against
FUNNELL.

RICHARD JONES on the Demise of WILLIAM COWPER and THOMAS BROMFIELD *against* JOHN VERNEY Esq. THOMAS WARFORD and ESTHER ELLIS.

T. 12 & 13
G. 2.
Tuesday,
July 10th.

THE opinion of the Court was thus given by

Willes, Lord Chief Justice. "Ejectment for a moiety of three messuages two gardens two stables and two coach-houses in *Lincoln's-Inn Fields*.

The case was made before me at a trial in *Middlesex*, Feb. 22d 1737, and is as follows.

Sir *John Cowper* Knight was seised in fee of several messuages and moieties of messuages on the south side of *Lincoln's-Inn Fields* in the parishes of *St. Giles in the Fields* and *St. Clement Danes*, of which the premises in question are part. And by indenture dated 28th of *April* 1691 in consideration of a marriage to be had between him and *Anne Sturney* settled the same to the uses following, as to a moiety of eight messuages (of which the premises in question are parcel) to the use of himself for ninety-nine years if he should so long live, then to trustees during his life to preserve contingent remainders, and from and after his death then to trustees therein named for 500 years on certain trusts, and after the determination of the said term to the use of the first second and every other son of the said Sir *John* on the body of the said *Anne* lawfully begotten in tail male, with other remainders over; and a proviso that it should and might be lawful for the said Sir *John Cowper* or any other person that should respectively be in possession of the said premises

A. tenant for life, having power to grant building leases for 61 years reserving the best improved ground-rent, granted a lease for that term, which was not expressed to be a building lease, but which contained a covenant by the lessee to keep in repair the premises demised (old houses) or such other house as should be built during the term;—Held that this was not a building lease within the power. —Such a lease being granted by tenant for life, who had a bare naked power without any legal interest, is

void, and consequently not capable of being confirmed by the remainder-man accepting rent.

X x

or

1739.

JONES dem.
COWPER
against
VERNEY.

or any part thereof by virtue of any of the limitations aforesaid from time to time during their respective lives to make leases in possession but not in reversion or remainder of the said premises or any part thereof so as no lease should exceed the term of twenty-one years from the making thereof, and so as the best rent should be thereupon reserved. The term of 500 years was by consent not to be insisted on by either side.

The marriage took effect. And afterwards an act was made, 2 Anne, to enable Sir *John Cowper* and *Anthony Henley* Esq. to make partition and grant building leases of several messuages and tenements in *Lincoln's-Inn Fields* &c; in which act the said settlement is in part recited, and it is also recited that the eight messuages (inter alia) which they the said Sir *John* and *Anthony* held by undivided moieties and in common between them were all or most of them very much decayed and must of necessity in a very short time be pulled down to the ground and rebuilt or else the whole benefit of the rents thereof would be absolutely lost, and that no person would undertake to rebuild the same unless encouraged by a longer term than twenty-one years which they the said Sir *John Cowper* and *Anthony Henley* were not empowered to grant, whereby not only the present interests and estates of Sir *John Cowper* and *Anthony Henley* but also those in remainder were in danger of being totally ruined or very much prejudiced, it was therefore enacted that the said eight messuages with their appurtenances should be vested in four trustees therein named and their heirs, in trust to make an equal partition of the eight messuages between Sir *John Cowper* and *Anthony Henley*, and proper directions are given for that purpose; and then it is enacted "that it should and might be lawful to and for the said Sir *John Cowper* during his estate and interest in the undivided or divided premises and after the death of Sir *John Cowper* as to such of the said premises whereof no building lease should be made in his lifetime and to and for every other person and persons to whom the premises are limited by the said indenture after the death of Sir *John Cowper* as they should be in possession by virtue of the said limitations, and in case of infancy to and for the guardian or guardians of such infants by indenture under his or their hands and seals, to grant lease or demise

demise the said undivided or divided moiety of the said eight messuages standing and being on the south side of the said fields belonging or to belong to the said Sir *John Cowper* with the appurtenances or of any of them or of any part or parts thereof at any time thereafter unto any person or persons for any term or number of years not exceeding sixty-one years from the making thereof for the encouragement of rebuilding such leased premises, so as no such lease be made without impeachment of waste by any express words, and so as on every such lease or leases there be reserved to continue payable during the same the full and utmost yearly ground rents that could be got for the same with respect to the costs and charges of rebuilding without taking any fine, and so as in every such lease there be contained a condition of re-entry for non-payment of rent and the usual and reasonable covenants; and that it should and might be lawful to and for such lessees their executors &c, paying and performing their rents and covenants, to have hold and enjoy the premises that should be so demised to them during their respective estates and terms therein."

That no partition has been made pursuant to the act. That afterwards Sir *John Cowper* by indenture, 25th March 1704, made a lease to *Richard Butler* and his assigns of a moiety of one of the said eight messuages with the yard &c (being the premises in question) to hold for sixty-one years from the making thereof. That the said act is recited in the said indenture; and the said lease is said to be made in pursuance of the said power: but in reciting the power the deed omits that part of it which says that it shall be *for the encouragement of rebuilding and reserving the best improved ground rent which can be got for the same*. The rent reserved by this lease is a pepper corn the first year, and afterwards during the term 45 *l.* a-year payable quarterly; usual covenants for payment of the rent &c: but the only covenant that in the lease relates to rebuilding is as follows; "That the said *Richard Butler* his executors &c shall at their own proper charges from time to time during the term well and sufficiently repair uphold maintain and keep the said messuages and premises thereby demised with the appurtenances, or such other messuage or buildings as shall during the said term be built on the premises, in by and with all and all manner of needful and necessary reparations and amendments when and so often

1739.

JONES dem.
COWPER
against
VERNEY.

1739.

JONES dem.
COWPER
against
VERNEY.

often as need shall be and require, and shall leave them so at the end of the term." There is a clause of re-entry for non-payment of the rent in 42 days after the days of payment. And a proviso that in case the premises or any part thereof should during the term be consumed or in any way impaired by fire beginning in any other messuage or tenement the said *Richard Butler* his executors &c should not be compellable to rebuild or repair the same; and another proviso that if the said *Richard Butler* his executors &c should at the end of the first forty years of the term be minded or desirous to determine the lease and estate thereby granted, and should give notice of such his mind and desire in writing to the said Sir *John Cowper* his heirs or assigns or to such person to whom the remainder or reversion of the premises expectant upon the said term should then belong or to the person authorised to receive the rent for the space of twelve months next before such his desire and intention, then and in such case the term and estate thereby granted should at the end of the said twelve months next after such notice absolutely cease and determine according to the intent and meaning of such notice. That the said *Richard Butler* duly executed a counterpart; and that the rent reserved was the full yearly value of the premises.

That *Richard Butler* soon after the making of the said indenture entered on the premises, and being so possessed erected and built on part of the premises two new messuages now in the possession of the defendants *Warford* and *Ellis*; and also a coach-house and stable now in the possession of the defendant *Verney*; and that the moiety of the said capital messuage and the rest of the premises in the said indenture of demise contained are now likewise in the possession of the said defendant *Verney*.

That *John Burnett* by virtue of an assignment from the executors of *Richard Butler*, dated 22d of *November* 1708, was entitled to all the remaining interest in *Richard Butler*'s lease of the 25th of *December* 1704. That *Richard Butler* and *John Burnett* respectively duly paid the reserved rent to the said Sir *John Cowper* during his life; that he died on the 23d of *October* 1729; and after his death *John Burnett* continued in possession of the premises and paid the reserved rent of 45*l.* a-year for two or three years after the death of Sir *John Cowper* unto the lessor of the plaintiff *William Cowper*, the eldest son of Sir *John Cowper* by the said *Anne*

Sturney. That the lessor *Thomas Bromfield* is the only surviving trustee under the said act; and that the other three died in the lifetime of Sir *John Cowper*.

1739.
JONES dem.
COWPER
against
VERNEY.

The question that was reserved upon this case was the general question, whether the lessors of the plaintiff or either of them are entitled to recover the whole or any and what part of the premises. And this question will depend upon these three;

1st, Whether the leases, which Sir *John Cowper* &c were empowered to make by the statute 2 An. for the term of sixty-one years were to be *building leases*;

2dly, If they were, whether the lease under which Mr. *Burnett* claims, was such a building lease;

3dly, If the two first points should be against the defendants, whether Mr. *Cowper* the lessor has not confirmed this lease by acceptance of the rent from the lessee.

As the evidence was laid before me in a very confused manner at the trial, and as it is a case of some value, I was very desirous to have the opinion of my Brothers; but now the matter has been fully spoken to (a), and every thing has been sifted to the bottom, it is, I think, a very plain case.

As to the first point; we are all clearly of opinion that the leases for sixty-one years, which Sir *John Cowper* and others were empowered to make by the statute 2 An., were intended to be building leases; not leases only for the encouragement of rebuilding, as was endeavoured to be made out by several very ingenious arguments by my Brother *Burnett* (who argued last for the defendants,) but leases by which the lessees should be *obliged to rebuild*, and in which there should be a proper rent reserved and proper covenants for that purpose. We agree that in the construction of acts of parliament, as well public as private, the intention of the Legislature ought to be inquired into, and when that appears plain and clear, the greatest regard ought to be had to it. But this intention must be collected from every part of the act, and every part of it shews that

(a) The case was argued by *Prime* and *Wright King's* Serjts. for the plaintiff, and by *Skinner King's* Serjt. and *Burnett* Serjt. for the defendants, on the 15th of *May* and 29th of *June* 1739.

1739.

JONES dem.
COWPER
against
VERNEY.

these were designed to be *building leases*. The act is entitled "An Act to enable Sir *John Cowper* and Mr. *Henley* to make a partition and grant *building leases*." In the recital one of the reasons assigned for making the act is that most of the houses were very much decayed and must of necessity in a short time be pulled down to the ground and rebuilt, or else the whole benefit of the rents thereof would be absolutely lost, and that no person would undertake *the rebuilding* of the same unless encouraged by a longer term than twenty-one years, whereby the present estates and interests of Sir *John Cowper* and Mr. *Henley* and also of those in remainder were in danger of being totally ruined or very much prejudiced; by which words it is plain that those who were to have leases for sixty-one years were to undertake to rebuild. In the power itself it is said that Sir *John Cowper* and those who come after him might make leases for sixty-one years of such of the premises of which he had made no building lease in his lifetime. In the description of these leases indeed it is only said "for the encouragement of rebuilding;" and these are the only words in the act from whence any inference can be drawn on behalf of the defendants. But to put this restrained construction on the words, and to determine that it was only intended that leases might be made for sixty-one years which long term would be an encouragement to lessees to rebuild, but that they were to be left at liberty whether they would rebuild or not, is to contradict the plain intent of the act expressed in every other part of it. First, The title and recital, as I have already observed, shew this. In the next place by the words made use of in the beginning of this very clause which gives the power it is plain that Sir *John Cowper's* were to be building leases; and it could not be intended that those who were to come after him were to have a larger power than him: besides this question arises on a lease made by himself. And then the words at the latter end of this clause make it still stronger; for the rent which is to be reserved is to be the full and utmost yearly ground rent that could be gotten with respect to the costs and charges of rebuilding. We have therefore no doubt upon this first point, but are all clear that it ought to be a building lease.

Secondly;

Secondly ; And we have as little doubt upon the second, that this cannot be considered as a building lease within the meaning of the act. There is no power given to the lessee to pull down and rebuild any part of the premises, nor any obligation upon him to do so, nor any covenant for that purpose. And in the very recital of the power that part for the encouragement of rebuilding and that relating to the reservation of the best ground rent that could be gotten with respect to the charges of rebuilding seem to be purposely omitted. A reasonable covenant in a building lease must certainly be meant of a covenant to build : but there is none such in this lease. It was insisted indeed that the covenant to repair and uphold implies this, and several cases were cited to this purpose : but it was very well answered that at most this only relates to rebuilding in case the buildings should fall down, but that there is nothing in this lease that authorises the lessee to pull down the buildings, nay that it would be waste if he should (a), and the lessor may besides bring an action for the materials when pulled down. Besides the best improved rent is reserved without any regard to the charges of rebuilding, which is another very plain argument to shew that building was not in the contemplation of the parties at the time of making the lease. The proviso likewise that the lessee should be at liberty to quit the premises at the expiration of forty years affords another very strong argument to this purpose. For though I do not think it makes the lease itself void, yet it shews plainly that this was not intended to be a building lease ; for if the lessee had been to rebuild, he would have been desirous to keep the premises as long as he could, and would never have desired a liberty of quitting the premises before the end of the term. But this liberty could be inserted with no other view but lest the premises should become so ruinous before the end of the term that the lessee should not think it worth his while to keep the premises in repair at a great expence and pay at the same time the best improved rent for them. What is found in the case that he has in fact voluntarily built two houses &c on the premises will make no alteration in the case, first, because he has

1739.
JONES dem.
COWPER
against
VERNEY.

(a) 4 Co. 63. The old law on this subject was so strict that if the lessee pulled down a house and built another in its room not so large, 22 Hen. 6. 18. B., or even larger, Co. Lit. 53. a., it was waste. But see *Mollineux v. Powell*, 3 P. Wms. 268. n. F.

1739.

JONES dem.
COWPER
against
VERNEY.

not pulled down the old house which was ruinous and rebuilt that, which was what was intended by the act; secondly, but principally, because what he has done since more than he was obliged to do by the lease certainly cannot make that lease good which was void ab initio, according to that known rule in the law *quod initio non valet tractu temporis non potest convalescere*. If a lease were made by a person, who ought to reserve the ancient rent, reserving a much less, it might as well be said that the lessee may make it good by consenting to pay the ancient rent afterwards; and yet such a notion was never thought of and would be most absurd. We think therefore that this can make no alteration at law, though it may in equity; for the lessee, if evicted, will probably be able to obtain satisfaction there for the lasting improvements which he has made.

What was inferred from several cases and several acts of parliament which were cited to shew that a much less term than sixty-one years has been considered as a sufficient term for the encouragement of rebuilding was all that could be said on the subject, but is we think of no weight; for we must construe this power as it is and as it appears on the act itself. The rules concerning the construction of powers seemed to be agreed on both sides, and therefore I need not say any thing upon them; and likewise because if this power were intended only to create building leases, as we are clearly of opinion that it was, it is beyond dispute that this power has scarcely been pursued in any part of it.

Thirdly; As to the last point I shall say but very little, because it is undoubted law that though an acceptance of rent may make a voidable lease good, it cannot make valid a deed or a lease which was actually void at first (a). And it is as plain that

(a) "It is to be observed that where the estate or lease is *ipso facto* void by the condition or limitation, no acceptance of the rent after can make it to have a continuance, otherwise it is of an estate or lease voidable by entry." *Co. Lit.* 215. a. See also *Finch v. Throckmorton*, *Cro. Eliz.* 221; *Co. Lit.* 295. b; *Bro. tit. "Lease,"* pl. 10. and 18; 3 *Co.* 64. b.; *Rickman v. Garth*, *Cro. Jac.* 173; *Doe d. Simpson v. Butcher*, *Dougl.* 50; *Goodright d. Wynne v. Humphreys*, *ib.* in not. 51; *Jenkins d. Yate v. Church*, *Cowp.* 482; and *Doe d. Martin v. Watts*, 7 *Durnf. & E.* 83. But

that this lease was actually void and not voidable only, for Sir *John Cowper* had only a naked power at the time of making it and no legal interest to which the power could be coupled; for the whole legal interest was vested by the statute in the trustees, and he at the most had only an equitable interest to which no legal power can be annexed. And if a man having a naked power make a deed or a lease not warranted by his power, such deed or lease is certainly void and not voidable only. If it had been otherwise, notwithstanding what was said to the contrary, I should have thought that the acceptance of the rent by the cestui que trust would certainly have made the lease good, and that it would even have been better than the acceptance by the trustee: but the lease being absolutely void, the acceptance by either of them can signify nothing.

1739.
JONES dem.
COWPER
against
VERNEY.

We are therefore all of opinion that judgment ought to be for the plaintiff; and as the verdict is already for him, the postea must be delivered to him in order that he may enter up his judgment."

JOHN TAPNER on the Demise of RICHARD PECKHAM
ANNE PALMER and ROBERT BALL *against* JOSEPH
MERLOTT and HENRY PRIOR.

Trin. 12 & 13
Geo. 2.
Wednesday,
July 11th.

WILLES Lord Chief Justice delivered the opinion of the Court as follows;

There must
be an actual
entry to avoid
a fine.

"Ejectment of the manor of *Keynor* and a messuage and lands in *Sidlesham* in the county of *Sussex*.

7 Mod. 297.
S. C. oct.
ed.

This comes before the court on a case made by Mr. Baron *Thompson* at the assizes held for the county of *Sussex* on the 30th of *July* 1737, which case is as follows. Sir *Thomas Miller* was seised in fee of the premises in question, and on the marriage of his daughter *Elizabeth* with *John Farington* eldest son

But in *Goodright d. Carter v. Straphan*, *Cowp.* 201. it was holden that a redelivery of a lease made by way of mortgage by a feme after the death of her husband, which had been delivered by her while she was covert, was a confirmation of the deed to

bind her without a re-execution, and that circumstances alone might amount to such redelivery, though the deed was a joint deed by the husband and wife affecting the lands of the wife.

Z z

of

1739.
TAPNER
dem. PECK-
HAM
against
MERLOTT.

of Sir *Richard Farington* in consideration of the intended marriage out of love and affection to *Elizabeth* &c, by lease and release 19th and 20th of *February*, 9 *W.* 3., he settled the premises to the use of himself and his heirs till the marriage, and afterwards to the use of *John Farington* and his assigns for ninety-nine years if he should so long live without impeachment of waste, then to trustees during his life to preserve the contingent remainders, and from and after his death to the use of *Elizabeth Miller* for her life for her jointure, and from and after their deaths to the use of the first and every other son of the said marriage in tail general, remainder to every after-born son in tail general, remainder to the first and every other daughter of the marriage in tail general, remainder to every after-born daughter, and for default of such issue to the use and behoof of the heirs and assigns of the said *John Farington* for ever.

The marriage took effect, and *John Farington* entered and was in possession during his life, and died on the 24th of *December* 1718 without any issue born in his lifetime or after his death. *Elizabeth* his wife survived him, and died seised of the premises on the 5th of *July* 1736.

The lessors of the plaintiff are the heirs at law of *John Farington*.

John Farington duly made and executed his will in writing on the 7th of *May* 1718, and devised all the manors messuages farms lands tenements and hereditaments both freehold and copyhold whereof or wherein he or any person or persons in trust for him had any estate of freehold or inheritance in possession reversion remainder or expectancy situate lying or being in the kingdom of *Great Britain* or elsewhere unto his uncle *John Merlott* his heirs and assigns for ever.

John Merlott duly made and executed his will in writing 24th *June* 1731, and devised to the defendant *Joseph Merlott* and his heirs for ever all that his reversionary estate called or known by the name of *Keynor's* farm in the parish of *Sidlegham* in the county of *Suffex* with the appurtenances thereto belonging, and died soon after in the lifetime of *Elizabeth*.

The defendant *Joseph Merlott* is son and heir to *John Merlott*.

After the death of *Elizabeth*, viz. 6th *July* 1736, possession was taken of the estate in question in the name and on the behalf of the defendant *Joseph Merlott* by virtue of a verbal authority

authority from him, and the tenant thereof at the same time attorned tenant to the defendant *Joseph*, and paid 1s. in the name and feisin of the rent, and the defendant *Joseph* on the 10th of *July* 1736, being acquainted that possession had been so taken, assented thereto.

The defendant *Joseph*, being seised of the premises as the law requires, in *Trinity* term 10 *Geo.* 2. and in the year 1736, viz., from the day of the *Holy Trinity* in three weeks levied a fine sur conusance de droit come ceo &c before his Majesty's Justices at *Westminster*, which fine was afterwards allowed and recorded in the Court in eight days after the purification of the Blessed *Virgin Mary* in the same year, and was afterwards three times publicly and solemnly read and proclaimed in the said court according to the form of the statutes &c; viz., the first proclamation thereof 12th *February* in *Hilary* term in the same year 1736, the second on the 20th of *May* in *Easter* term 1737, and the third on the 25th of *June* in *Trinity* term 10 & 11 *Geo.* 2. and in the same year 1737, and no other proclamation was had or made thereupon at the time of the said trial.

The plaintiff at the trial did not give any evidence of an actual entry made by the lessors of the plaintiff upon the estate in question after the said fine levied, but the defendant at the trial confessed lease entry and ouster according to the common rule entered into by him.

The questions reserved for the opinion of the Court were three; 1st, What estate the deviser *John Farington* had in him at the time of the devise.

2dly, What was the operation of the fine levied by *Joseph Merlott* the heir and devisee of *John Merlott*.

3dly, Whether the lessors of the plaintiff could maintain this ejectment without an actual entry.

As we are all clear upon the last point, and as that will determine the question in this ejectment, there is no necessity to say any thing on the two first: however as they were pretty much enlarged upon in the argument (a), I shall say a little on each of them.

(a) The case was twice argued; by the plaintiff and by *Eyre King's Serjt.* *Wright King's Serjt.* and *Boole Serjt.* for and *Price Serjt.* for the defendants.

1739.

TAPNER
dem. PECK-
HAM
against
MERLOTT.

As to the first; we are of opinion that *John Farington* the devisor had only an estate for 99 years in him at the time of the devise to *John Merlott*: so it is expressly held in *Co. Lit.* 319; and I know no case to the contrary. If indeed *John Farington* had had an estate for life, he would have had a fee-simple, because the last remainder was limited to him and his heirs; but it has never been extended further. And this general rule seemed to be agreed to on all sides: but two answers were endeavoured to be given to this; 1st, That the word *assigns* plainly shewed that it was intended that the inheritance should vest in *John Farington*; 2dly, That this being a conveyance made by way of use must be construed in a different manner from a conveyance of a legal estate, and that, as in a will, the words must be construed according to the intent of the parties. As to the 1st; an answer was endeavoured to be given that *assigns* must mean the *assigns of the heirs*: but that I think was by no means satisfactory, because it is expressly said the "*assigns of John Farington*". But another answer suggested itself to me this morning, on which I will give no mature opinion, because there is no occasion, but I think there is some weight in it, that this word, though it does not alter his own estate, might give him a power of disposing of it. For supposing this last remainder had been to him and his heirs, or to such persons as he should appoint, he might certainly in that case have disposed of it by his will, and I am inclined to think as at present advised that the word "*assigns*" may admit of this construction. But I say this only by the bye, and as only my private opinion, which occurred to me but this morning, there being no occasion to give any resolution upon it, as we are all of opinion for another reason that the plaintiffs cannot recover in this ejectment.

As to what was insisted upon that a conveyance to uses is to be construed as a will and in a different manner from other conveyances, we are all clearly of a contrary opinion (a). For since the statute of uses an use is turned into a legal estate to all intents and purposes; it must be conveyed exactly in the same manner and by the same words; and if it were otherwise, as most conveyances are now made by the way of use, endless confusion would ensue. A case indeed was cited, and much re-

(a) Vid. 3 *Atk.* 734; and *Doe d. Muffell v. Morgan*, 3 *Durnf. & East* 765. accord.
lied

lied on, to establish this doctrine. That was the case of *Leigh v. Brace* reported in *Cartbew* 343, and 5 *Mod.* 266 (a); in the first book said to have been adjudged in *B. R. Hil. 6 W.* and in the last *M. 8 W.* The words of that deed were thus; an estate was vested in trustees in fee to the use of the grantor for life, then to the use of *Thomas Brace* his son and his heirs, and for default of issue of the body of the said *Thomas Brace* then to the use of the heirs of the grantor. The special verdict is set forth in 5 *Mod.*, and I have compared it with a copy of the record which has been brought to me; and in that case the Court did certainly determine that *Thomas Brace* the son took only an estate-tail; but in 5 *Mod.*, where the case is more largely and more particularly reported than in *Cartbew*, there is not one word said of any difference between a conveyance by way of use and any other conveyance: But the resolution (appearing there) is founded upon other determinations in respect to legal conveyances; as the case in *Co. Lit.* 21. a., where it is held that if a man make a feoffment to another and his heirs, habendum to him and the heirs of his body, he shall have an estate-tail; and a case out of the 37 *Lib. Ass.* 15, long before the statute of uses, was cited for that purpose. Another case was cited from 19 *Hen.* 6. 74, that if a feoffment be made to a man and his heirs, and if he die without heirs of his body, remainder over, this is an estate-tail. They considered therefore the words in this deed as one sentence, and the latter as explanatory of the former. And they cited likewise *Beck's* case, reported in *Lit.* 344, where a feoffment was made to the first son and his heirs and for default of such issue remainder over. But the Court, as appears by the report in 5 *Mod.*, said not one word about the statute of uses, but said they would consider it just in the same manner as if a gift were made to a man and his heirs, viz., to the heirs of his body. It is indeed said in *Cartbew*, where the case is very shortly reported, that the Court laid a great stress upon it's being a conveyance by way of use, which conveyances they said had been always construed as wills, and that they were not tied up to the strict forms of conveyances at common law, and that it was so adjudged on the same deed in *B. C.* on a special verdict. I own that *Cartbew* is in general a

1739.
TAPNER
dem. PECK-
HAM
against
MERLOTT.

(a) 1 *Lord Raym.* 101, and 3 *Salk.* 337, S. C.

1739.
TAPNER
dem. PECK-
HAM
against
MERLOTT.

very good and a very faithful reporter; but I fancy he was mistaken here, because I cannot think that the Court would give so absurd a reason for their judgment, especially since there is not a word said of it in *5 Modern*, where the case and the arguments upon it are very particularly reported. However if this had been as *Cartbaw* reports, yet it is a single case, it is contrary to reason and common experience, and such a determination would make such a confusion in all the property of the people of this kingdom, that I own I should have no regard to it but think that the contrary ought to be declared to be law.

As to the second question, what is the operation of this fine, there may be some difficulty to determine it, and there being no necessity we shall give no opinion upon it. I shall only say that it appears by the examination of the officer that a fine is not said to be engrossed till it comes to the Chirographer, and he makes out the several parts of it; and it is never proclaimed, nor can it be so, until it is brought to him and engrossed, though it may operate as a fine without proclamations from the time when it was first levied. Nor shall we determine whether or not this is to be considered as a fine with proclamations or not, the action being brought before the time when all the proclamations were expired, and all the proclamations being made that could be made before that time; because it is clear that this was a fine of one sort or other, and there is no pretence to say that the fine was void; and if not,

Thirdly, We are all of opinion that when a person in possession levies a fine of any sort, the parties out of possession cannot maintain an ejectment without an actual entry. There was no distinction made by the Judges in the resolution which they came to in the 2d of *Anne* between this or that sort of fine: but their resolution was general, that there must be an actual entry in order to avoid a fine (a). The resolution in the case of *Little v. Henton*, *Salk.* 259, in which were cited the case of *Witbers and Gibson* 3 *Keb.* 218, and the case of *Pye v. Billing*

(a) *Berrington v. Parkhurst*, 2 *Str.* 1085; 4 *Bro. Parl. Caf.* 353; *Fitchet v. Adams*, 2 *Str.* 1128; *Oates v. Brydon*, 3 *Burn.* 1897; *Goodtitle v. Cator*, *Dongl.* 486; and *Doe d. Compere v. Hicks*, 7 *Durnf. & E.* 433. but it has since been determined that it is not necessary in the case of a fine at common law. *Jenkins d. Harris v. Prichard*, 2 *Wils.* 45.

1 *Ventr.* 332, extends only (a) to an entry for nonpayment of rent; and the reason given for it in all these cases is that the confession of lease entry and ouster was sufficient. As this has been so long settled, I am not for altering it now: but were it a new case, I should be of a different opinion even in respect to an entry for nonpayment of rent, because the reason given for it is absurd; the confession of the entry in the rule being only a confession of the entry of the nominal plaintiff and not a confession of the entry of the lessor. Though therefore I shall think myself bound by this rule, which has been so long established, as far as it goes, yet I am so little satisfied with the reason of it that I shall never be for extending it one jot farther.

Without therefore giving any positive opinion on the two first points, as we are all agreed on the third and have not the least doubt, the verdict given for the plaintiff must be set aside according to the rule of *nisi prius*, and the plaintiff must pay the costs of a nonsuit."

(a) But in *Oates d. Wigfall v. Brydon*, 3 Burr. 1897, Lord Mansfield, in delivering the opinion of the Court, said "To avoid a fine there must be an actual entry; and the demise cannot be carried back beyond the actual entry (1). In all other cases the confession of lease entry and ouster is sufficient. And so it is now settled that it is sufficient for an ejectment brought upon a condition broken."

(1) And it has since been ruled in *Compere v. Hicks*, 7 Durnf. & East 727, that the party after he has made an actual entry cannot recover the mesne profits that accrued before.

ROBINSON *against* TUCKWELL.

"*WRIGHT* Serjt. shewed cause against a rule to set aside an execution in an action brought upon a judgment by the defendant in the first action for the costs, because a writ of error had been brought and allowed on the judgment in the first action.

And he objected against the rule, because there was no motion to stay the proceedings in the second action, in which case the Court would have ordered the plaintiff not to take out execution so long as the writ of error was depending, but would have given him leave to proceed to judgment. And he insisted that there

1739.

TAPNER
dem. PECK-
HAM
against
MERLOTT.

M. 13 G. 2.
Thursday,
Oct. 25th.

The Court refused to set aside the execution in the second action, (a writ of error having been brought on the first judgment,) because the defendant had not before applied to stay the proceedings in the second action.

Sir G. Co.
159. S. C.

1739.

ROBINSON
against
TUCKWELL.

there being no such motion the plaintiff was at liberty by the course of the Court to take out execution in the second action notwithstanding such writ of error. And he cited the case of *Humphreys v. Daniel* (a) in this court, P. 9 Geo. 2., where this point was expressly so determined. Besides he insisted that no bail had been put in upon such writ of error, and that therefore it stayed nothing.

Eyre Serjt. contra.

No bail was necessary, because this was an action on a judgment only for costs; which was agreed. And as to the principal objection, he relied on the reason of the case, because otherwise there might be a contrariety of judgment. But he admitted that the common practice is to apply to the Court to stay the proceedings.

Rule discharged by *The Court*, according to the case of *Humphreys v. Daniel*, which was agreed to be as cited (b)".

(a) *Barnes* 202; and *Sir G. Co.* 129. (b) See the next case; *Clarkson v. Physick*.

M. 13 G. 2.
Thursday,
Nov. 8th.
S. P.
Barnes 203.
S. C.

CLARKSON against PHYSICK.

"ACTION on a judgment. Writ of error on the first judgment. The plaintiff in the action had proceeded to judgment and taken out a *capias ad satisfaciendum*, which had been delivered into the hands of the sheriff and a warrant made out, but it was not actually executed before the motion. The defendant had never applied to the Court, but now moved to stay execution in the second action by reason of the writ of error depending on the first. And

Comyns Serjt. for the defendant endeavoured to distinguish it from the case of *Robinson v. Tuckwell* (a) and the case of *Humphreys v. Daniel* there cited, because in both those cases the execution was actually executed before the motion.

But *The Court* were of opinion that this was a distinction without a difference, and that the defendant, if he would stay

(a) The preceding case.

execution

execution for this reason, ought to apply before judgment. However the matter was compromised; and a rule was entered into by consent that upon the defendant's bringing the money into court, and agreeing to bring no writ of error on the second judgment, the proceedings on the execution should be stayed until the writ of error was determined".

1739.
CLARKSON
against
PHYSICK.

WANT against SWAYNE.

"A RULE had been obtained against *Hutchinson*, administrator of *Duckworth* deputy bailiff of *Simpson* chief bailiff of the Honor of *Pontefract* in *Yorkshire*, to shew cause why he should not pay a sum of money recovered by *Want* against *Swayne*, for which a writ of execution had been taken out and the warrant delivered to *Duckworth*, and which money was alleged to have been received by *Hutchinson* since the death of *Duckworth*.

M. 13 G. 2.
Thursday,
Oct. 25th.

The Court refused to order the administrator of a bailiff (to whom an execution had been delivered) to pay over to the plaintiff the money which he had received after the bailiff's death.

And now, upon shewing cause, the case came out to be that the warrant was delivered to *Duckworth* in his lifetime, who instead of executing it as he ought having some money owing to him from *Swayne* took a security from *Swayne* for his own money and the money due to *Want*, and after the death of *Duckworth Hutchinson*, as his administrator, received the whole money of *Swayne*. *Hutchinson* in his affidavit did not deny the receipt of the money, but insisted that at first when he received the money he did not know that any of it was on the account of *Want*'s execution, that he took out administration as a considerable creditor of *Duckworth*'s, and that he had either retained or paid to the creditors of *Duckworth* more money than he had received, and that he had no assets in his hands.

The Court were of opinion that they could give *Want* no remedy in this summary way, but left him to pursue his remedy at law or in a court of equity as he could; but seemed to think him without remedy, because he could not be in a better condition than if *Duckworth* had actually received the money on the execution, in which case *Want* would only have been a cre-

1739.

WANT
against
SWAYNE.

ditor on simple contract, and the administrator might have preferred any other creditors in payment or retained to pay himself."

M. 13 G. 2.
Wednesday,
Nov. 28th.

JOHN MARRIOTT *against* ELIZABETH THOMPSON
Executrix of WILLIAM THOMPSON (a).

[H. 12 GEO. II. Rol. 1285.]

If a bond (on marriage) be given to trustees, conditioned to leave the intended wife a sum of money, and the wife be made the executrix of the obligor, she may retain the amount of the bond, and plead such retainer to an action brought against her by another bond creditor of the husband.

—Secus, if the bond be conditioned to pay the trustees the money in trust for the wife; but in such case the wife may pay the trustees out of the assets, or pay out of her own money and retain assets pro tanto, or confess judgment to the trustees to cover assets.

"DEBT on a bond of the testator, dated 30th *January* 1732 in the penalty of 100*l*.

The defendant prayed oyer of the bond and condition, which is for the payment of 50*l*. and interest on the 30th of *July* then next. And then pleaded that *W. Thompson* her husband before her marriage, on the 22d of *July* 1728, became bound to *Eleanor Baldwin* and *W. White* in the penal sum of 800*l*., with condition that if the said *W. Thompson* should at his death leave to the said *Elizabeth*, his intended wife, if the said marriage took effect and she should survive him, the just sum of 400*l*., free and clear from all debts demands and incumbrances whatsoever, then the said obligation should be void. And she further pleaded that the marriage took effect; and that her husband on the 17th of *December* 1736 made his will and appointed her sole executrix, and died on the 25th of *September* 1737; that she proved the will 10th *October* 1737; and that the said *W. Thompson* did not at his death leave to the said *Elizabeth* the said 400*l*. or any part thereof, but the same is still unpaid, and the said bond is still in force not cancelled annulled or in anywise satisfied. And the defendant further pleaded that she hath fully administered all the goods and chattels which were of the said *W. Thompson* at the time of his death in the hands of the defendant to be administered, except goods and chattels to the amount of 5*l*.; and that she hath no more; which are not

(a) This case is reported in 7 *Mod.* 292. oct. ed., but without the judgment of the Court. In page 293 an opinion is supposed to have been given by *Page* and *Denton* Justices: but that is evidently a mistake, Mr. J. *Page* being a Judge of *B. R.* and Mr. J. *Denton* was not in court

when this case was decided. The whole of that paragraph is probably the argument of counsel, and "*Page and Denton*" the name of a case on this subject reported in 1 *Ventr.* 354, on which the counsel were commenting.

sufficient

sufficient to satisfy to the said *Elizabeth* the said 400*l.*, and which are bound subject and liable to the said *Elizabeth* for payment and satisfaction thereof, and which she retained (a) and hath a right to retain in her own hands towards satisfaction thereof; and so prays judgment of the action.

1739.

MARRIOTT
against
THOMPSON.

The plaintiff demurred generally, and the defendant joined in demurrer.

Belfield Serjt. and *Wynne* Serjt. for the plaintiff (b) took two objections to the plea;

1st, That the defendant could not retain, because the bond was made to trustees and not to her; but that if she would have covered the assets, she should have caused the trustees to have brought an action against her and have confessed judgment in such action. That the words in the condition are *leave* and not *pay*; and that if the 400*l.* mentioned in the condition could be considered as a debt due to her, it was at most but a debt on simple contract, and therefore she could not retain it against a bond creditor.

2dly, That the plea is inconsistent with itself; for she insists at first that no part of the 400*l.* is paid, and yet afterwards admits that she has 5*l.* in her hands, which she has retained towards satisfaction thereof.

Per Curiam (*Denton* J. absent, but agreeing with us)

The justice and equity of the case being with the defendant, we ought to go as far as we can to make her plea good, and especially since she has acted a very fair and honest part. For she might, by confessing judgment to her trustees, have covered assets to the amount of 800*l.*, within the rule that was laid down in *B. R.* in the case of the *Bank of England v. Mor-*

(a) Vide *Cliff's Ent.* 349; *Thomp.* 156; 2 *Brown* : 73; *Vidian's Entr.* 188.

(b) This case was twice argued, the first time in *Easter* term 1739 by *Belfield* Serjt.

for the plaintiff and *Draper* Serjt. for the defendant, and on the 27th of *October* 1739 by *Wynne* Serjt. for the former and *Burnett* Serjt. for the latter.

rice;

1739.
MARRIOTT
against
THOMPSON.

rice (a); for she had it not in her power to prevent the penalty of the bond being forfeited.

That an executor may retain for a debt due to himself (b) against any creditors in an equal degree is undoubted law: it would be endless to cite cases to that purpose; and the plain reason of it is, because he cannot sue himself, and the law will never suffer that a right should be without a remedy.

But the objection here is that the bond is not to the executrix herself, but to the trustees, and so the debt in point of law is due to them. If the money in the condition had been to have been paid to them, though in trust for her, there would have been something more in that argument; and we should have been of opinion in that case that this plea, as pleaded, would not have been good. But though she could not in that case have retained, she might have paid the money to the trustees and insisted on the payment, or she might have paid it out of her own money and have retained assets pro tanto. For that an executor, if he pay his testator's debts out of his own money, may retain assets pro tanto against creditors of an equal degree is expressly held in *Dyer* 2. a.; *Moor* 2.; *Cloydon v. Spensar*; 2 *Rol. Abr.* 684. pl. 11; and in several other books.

But in this case the payment in the condition being to the executrix herself (c), we are of opinion that she may retain sufficient to satisfy it according to the case of *Roshelly v. Godolphin* reported in *Raym.* 483, 2 *Show.* 403, and by the name of *Boskellet v. Godolphin*, in *Skinner* 214, and adjudged in *B. R. M.* 34 *Car.* 2., which is a case almost in point. There a bond

(a) Since reported in 2 *Str.* 1028; *Rep. temp. Hardw.* 219; and 4 *Bro. Parl. Cas.* 287.

(b) Or in trust for another. Vide *Plumer v. Marchant*, 3 *Burr.* 1380. But an executor de son tort cannot retain in satisfaction of his own debt. *Vaughan v. Brown*, 2 *Str.* 1106. and *Curtis v. Vernon*, 3 *D. & E.* 590.

(c) And where the promise or bond is made to the intended wife herself, without

the intervention of a trustee, the promise or bond is not released by the marriage; and if the wife be made executrix, she may retain in satisfaction of such debt. *Cage v. Aclon*, 12 *Mod.* 290; *Com. Rep.* 67; *Salk.* 325; and 1 *Ld. Raym.* 515; *Cannel v. Buckle*, 2 *P. Wms.* 242; *Milbourn v. Ewart*, 5 *Durnf. & E.* 381; and *Hayes d. Foord v. Foord*, there cited, 386.

was given before marriage to two trustees, with condition to pay to the defendant the widow 3000*l.* within fourteen days after the husband's (the testator's) death: it was held that the widow being executrix might retain sufficient to pay herself that 3000*l.* The only difference between the cases is that it is *leave* in one and *pay* in the other. But that, we think, makes no material difference, for that "leave" is the same as "pay" (a).

1739.
MARRIOTT
against
THOMPSON.

As to the objection that this must be considered as a debt on simple contract, we think there is no weight in it. For whenever a man by deed obliges himself to pay money to another, it is a debt by specialty; and if it were otherwise, all money to be paid by the conditions of bonds must be considered as debts on simple contract if the bond be not forfeited in the lifetime of the testator, which was never yet pretended.

As to the second objection; the merits being clear with the defendant, we will endeavour to make the plea good if we can; and we think that the objection may easily be got over. To be sure, it might have been pleaded better: but we think that the plea may be so construed as not to be inconsistent. For no assets might come to the defendant's hands immediately on the death of the testator, but those confessed by the plea might come to her hands afterwards. And as to those words "the same is still unpaid"; if *same* (as it may) be taken to relate to the whole 400*l.* there is no repugnancy; or if it be construed to any part thereof it is true; for he was to leave her 400*l.* free and clear from all debts demands and incumbrances whatsoever; whereas the 5*l.* confessed would certainly be liable to pay the plaintiff's demand if she did not cover it in the manner in which she has done.

Judgment therefore was given for the defendant."

(a) And so it was ruled in *Cockcroft v. Porter* adds a quære to it) and in *Leane v. Black*, 2 P. Wms. 298. (though the re- *Casby*, 2 Bl. Rep. 965.

1739.

M. 13 G. 2.
Wednesday,
Nov. 28th.

An attachment awarded against the prochein amy of the plaintiff for nonpayment of costs after judgment for the defendant.

Barnes 128.
Prac. Reg.
102. S. C.

SLAUGHTER, by his next Friend THOMAS MUNDY,
against TALBOTT.

“A RULE nisi had been made against the prochein amy for an attachment for nonpayment of the costs, judgment having been given against the plaintiff and the costs taxed.

Eyre Serjt. shewed cause against the rule; and insisted that the prochein amy ought not to be liable to costs there being no judgment against him. And he said that the officers of the court were formerly appointed guardians and procheins amies to sue and defend for infants, and the Court could never intend to subject them to costs. He cited 2 *Inst.* 261. And insisted that they ought to be no more liable to costs than attornies.

Skinner Serjt. contra insisted that this is the only reason why guardians and procheins amies are appointed, in order to be responsible for the costs, because the infants are not. And he cited the case of *Englefield v. Round*, *Hil.* 1726 (a).

I was of opinion that the rule must be made absolute; for however the practice might be anciently, the officers of the court are not now usually appointed either guardians or procheins amies. And the practice was probably altered for this very reason, because they would be liable to costs. It is probably for this reason that they do appoint attornies; for otherwise I see no reason why an infant may not as well appoint an attorney by the leave of the court as a prochein amy. An infant by law may make a presentation to a benefice, though of never such tender years. The argument that there is no judgment against the prochein amy is of no weight; for there is no judgment against the lessor of the plaintiff in ejectment.

Mr. J. Fortescue Aland was of the same opinion; and said that it had been so frequently adjudged in *B. R.* while he sat there. The procheins amies may have satisfaction over against the infants, and generally they take security.

(a) *Sir G. Co.* 32; and *Roper v. Harrison*, there cited, S. P.

Mr.

Mr. J. W. Fortescue was of the same opinion; and said that the Court of Chancery, if a motion be made to change the prochein amy, always refer it to the Master to see if the person proposed in his room be a proper person.

1739.

SLAUGHTER
against
TALBOTT.

"So the rule was made absolute."

DAVIS *against* MANSELL.H. 13 G. 2.
Friday,
February 1st.

"**M**OTION by the plaintiff after issue joined to have the money out of court and costs to the time of bringing it in, the plaintiff offering to pay to the defendant the costs afterwards when taxed.

If plaintiff proceed after the defendant has paid money into court, the Court will before trial allow him to take it out with costs to the time of paying it in, on his paying the defendant his subsequent costs.

I thought this motion not reasonable, unless the plaintiff would pay the defendant the whole costs of the suit to this time as he would be entitled to them in case the plaintiff had gone on to trial and had recovered no more than the defendant had brought in; it being the plaintiff's fault that he proceeded so far without taking the money out.

Barnes 282.
Prac. Reg.
255. S. C.

But the prothonotaries certified that the course of the court was otherwise; And

Brother Fortescue Aland agreed with them that the plaintiff might take out the money at any time before trial, and would be entitled to costs till the time of the money brought in, and should only pay the defendant costs for the proceedings afterwards (a). The case of *Savage v. Franklyn* (b), Hil. 8 Geo. 2. was cited to this purpose; and the prothonotaries said that there was a multitude of cases of the same sort.

So this coming on upon the defendant's shewing cause against a rule which had been made nisi before, the rule was made absolute (c)."

(a) *Vane v. Michall*, Barnes 284; and *Hartley v. Bateson*, 1 D. & E. 629. S. P.

(b) Barnes 280.

(c) But if the plaintiff proceed to trial and fail, he is not entitled to the costs even

up to the time of the defendant's paying money into court. *Stevenson v. Yorke*, 4 D. & E. 10; and *Kabell v. Hudson*, ib. 11. Nor if he proceed to trial, and a juror is withdrawn, *Stodhart v. Johnson*, 3 D. & E. 657.

1739, 40.

H. 13 G. 2.
Wednesday,
Feb. 6th.GODOLPHIN EDWARDS and JOHN SPICER against
ACTON MOSELEY and THOMAS STANLEY.

A lord may
seize as well
as distrain
for heriot
service.

—But if a
heriot be re-
served by
deed since
the stat. quia
emptores,
payable by
tenant in fee,
it will be
considered as
rent, and
then the
landlord
cannot seize,
but must
either distrain
or bring an
action for
nonpayment.

TRESPASS for taking and carrying away a boat and a cabinet. It came on before my Brother *William Fortescue* at the *Salop* assizes. Verdict for the plaintiff, subject to the opinion of the Judge on this case.

In trespass the defendants justified taking and carrying away the boat and cabinet for two heriots, which they insisted became due to the defendant *Moseley*, as lord of the manor of *Bildwas* on the death of *Samuel Edwards*, who died seised of lands in the manor called *West Coppice* and *Whistouse*.

In order to make out this right the defendants produced in evidence the counterpart of a feoffment, dated 30th of *August* 22 *Eliz.*, between *Edward Gray* of *Bildwas* in the county of *Salop* of the one part and *Launcelot Lacon* of *Kendley* in the said county of the other part; whereby the said *Edward*, under whom the defendant *Moseley* claims, granted the premises to the said *Launcelot*, under whom the said *Samuel Edwards* claimed, and his heirs at and under the yearly rent of 10*l.*; and in the said feoffment is the following reservation, viz. and paying two heriots at the decease of him the said *Launcelot*, and the decease or deceases of all and every his heirs or assigns of the premises." It likewise appeared in evidence that the defendants seised the said boat and cabinet, which belonged to the said *Samuel* who died seised, for the two heriots reserved by the said deed.

The question was whether on this title the defendant *Moseley* had a right to seise these goods as heriots.

The rule at the assizes was so drawn up that if the Judge should be of opinion with the plaintiffs, then the defendants

657. Nor, if he enter into a consolidation rule in actions on a policy of insurance, and become nonsuit in one, is he entitled to the costs up to the time of pay-

ing money into court in the other actions that were not tried. *Burstell v. Horner*, 7 D. & E. 372; and *Sykes v. Wilson*, E. 39 G. 3. B. R.

should return the goods and pay the plaintiffs their costs, but if the Judge should be of opinion with the defendants, then they should retain the goods and the plaintiffs should pay the costs.

1739, 40.

EDWARDS
against
MOSELEY.

The case had been spoken to before the Judge (a); and though he was clearly of opinion with the plaintiffs, yet on the importunity of the counsel he was prevailed on to let it come before the Court: but he said that he left it to the jury whether the defendants took the goods by way of distress for the heriots, or seized them as heriots; and that they found that they seized them as heriots.

This case coming this day before the Court,

Skinner Serjt. for the defendants insisted, 1st, that this reservation was certain enough; and 2dly, that the defendants had a right to seize the goods as heriots.

He insisted, as to the first, that "heriot" vi termini does not signify the best beast; for which purpose he cited *Lambert de priscis Anglorum legibus* fo. 423. *Spelman's Gloss.* 287, 8; *Co. Copyholder*, p. 25; and the preface to a treatise written by *Fortescue* J. of absolute and limited monarchy. And he insisted that heriots were not services, but a part of the feudal tenure. He said that for heriot custom a man may either seize or distrain; and that the same has long since been holden to be law in respect to heriot service (b), though this was formerly doubted (c). He insisted that this was heriot service; and that though a *heriot* usually means the best beast, it is otherwise in several manors, and must be determined by the custom of the manor.

(a) It was argued before him by Mr. *Hollings* and Mr. *Taylor* for the plaintiffs, and by *Skinner* King's Serjt. *Hayward* Serjt. and Mr. *Wilbraham* for the defendants.

(b) In the time of *Edward* the Third. See *M. 6 Ed. 3.* 36. pl. 3; *Fitz. Abr.* "Heriot," pl. 2; *Bro. Abr.* "Heriot," 2; *Plowd.* 96; *Odibam v. Smith*, *Cro.*

Eliz. 589; *Moor* 540, in *B. R.* reversing the judgment in *B. C. And.* 298; *Parker v. Gage*, 1 *Show.* 81, and *Holt's Rep.* 337; *Major v. Brandwood*, *Cro. Car.* 260; *Osborne v. Sture*, 2 *Lutw.* 1367; and *Austin v. Bennet*, *Salk.* 356.

(c) Vide *Keilw.* 82; *Bendl.* 30. pl. 47; and *Doct. & Stud. Dial.* 2. c. 9. fo. 76.

1739. 40.

EDWARDS
against
MOSELEY.

Bootle Serjt. for the plaintiffs insisted that a heriot properly signifies the best beast, but admitted that by a particular custom there may be a heriot of the best goods. And he cited *Hob.* 176; *Hutton* 4. He admitted that if this were a good reservation, the lord of the manor might seize the things in question for heriots, but insisted that this reservation was uncertain and void, as "heriot" is a word of no certain signification.

I was clearly of opinion for the plaintiffs as to both points, though *Bootle* Serjt. for the plaintiffs gave up one of them.

1st, I admitted it to be good law that a man may seize as well as distrain for heriot service. But I was of opinion that these could not be considered as heriots, because heriots are services and part of the tenure; and since the statute of *quia emptores terrarum* no tenures can be created or heriots reserved. It must be considered therefore only in the present case as the reservation of a rent or an agreement to pay a certain thing; and consequently if a rent, it must be certain what that rent is, and there must be the same certainty if it be considered as an agreement to pay or deliver any thing. Now the word "heriot" has no certain signification: but the meaning of it must always be determined by the custom (a) of the manor, which can have no operation in the present case. If it has any certain signification, it means (as has been insisted) the best animal; and if so, for that reason likewise this seizure of dead goods cannot be justified.

2dly, I was of opinion likewise that the defendants could not seize the things in question, even though the reservation had been certain enough. 1. If it be considered as a rent, no one can seize a thing reserved as a rent, but must either distrain for it or bring an action. 2. If it be considered as an agreement to pay or deliver any thing, no one can seize upon such agreement, but must bring his action upon the agreement if it be not performed.

Mr. J. *Fortescue Aland* was of the same opinion. And he said that "heriot" was originally derived from "here", which in *Saxon* signifies an army, and "geat" which signifies provi-

(a) Vid. *Parkin v. Radcliffe*, *Bos. & Pull.* 282.

sion;

tion (a); and that the reservation was originally of something proper for an army. And he exploded the notion that *beriot* was derived from *beir*.

1739, 40.

EDWARDS
against
MOSELEY.

Mr. J. *Wm. Fortescue* was of the same opinion; adding that he was always of this opinion both at the trial and when the case was spoken to before him.

After we had delivered our opinions, *Hayward* Serjt. for the defendants insisted much to have it spoken to again; but, thinking it to be a very clear case, we would not permit it.

So we gave judgment for the plaintiffs according to the rule."

(a) Contrary to Lord *Coke's* definition, | lord and "geat" *best*; i. e. the lord's
Co. Lit. 185. b., that "here" signified | *best*.

JOHN DENNETT *against* JOHN GROVER, JOHN STEEL,
and JOHN EDWARDS.

H. 13 Geo. 2.
Wednesday,
Feb. 6th.

"TRESPASS, for that the defendants on the 30th of *January* 1738 broke and entered the house of the plaintiff at *Steyning* in *Suffex*, and continued there ten days without the license and against the will of the plaintiff, and for the whole time greatly disturbed the plaintiff in the peaceable possession of the said house, and seized took kept and detained and converted to their own use and sold and disposed of divers goods and chattels particularly specified in the declaration to the value of 100*l.*; damage 150*l.*

If A. license B. to enter his house to sell goods, B. may take assistants if necessary for the purpose of selling the goods. And if it be pleaded that B. and also C. and D. his servants and by his command entered for that purpose, and necessarily continued there so long, it will be understood that it was necessary for them all to enter.

The defendants pleaded not guilty as to all the trespasss, except breaking and entering the said house and continuing there for the space of ten days and disturbing the plaintiff in the possession thereof for the said ten days; and thereupon issue is joined.

And as to breaking and entering the said house &c, they pleaded that before the said time when &c *viz.* 21st *January* 1738 the plaintiff licensed the said *John Steel* to enter the said house and to continue therein for the sale of divers goods and chattels

1739, 40.

DENNETT
against
GROVER.

chattels of the said *John Steel* in the said house; by virtue of which said license he the said *John Steel* in his own right and the said *John Grover* and *John Edwards* as his servants and by his command afterwards, viz. at the said time when &c peaceably entered the said house in which &c by and through the door thereof (then being open) to sell the said goods and chattels of the said *John Steel*, and in and about the sale they the said *John Grover John Steel* and *John Edwards* necessarily continued in the said house in which &c for the space of ten days then next following, and in so doing they the said *John Grover John Steel* and *John Edwards* did necessarily give as little disturbance to the said *John Dennett* on that occasion as they could, which are the breaking and entering &c; and this they are ready to verify; wherefore they pray judgment &c.

The plaintiff demurred generally, and the defendants joined in demurrer.

Agar Serjt. for the plaintiff took two objections to the plea; 1st, In substance, that, it being jointly pleaded by all the defendants, if not good as to any of them, it was bad as to all (a) (quod conceditur;) and that the license, being only to *John Steel*, would not justify his taking the other two defendants along with him into the house; 2dly, That it was bad in point of form, for that the plea ought to have concluded to the country.

First; To support the first objection he cited *Bro. Abr. tit. "License,"* pl. 10; and the case of *Wickham and Walker*, adjudged in this court, where it was ruled that a person qualified to kill game could not take others with him who were not qualified. And he insisted very strongly that the license was personal to *John Steel*; and that therefore it could not justify the entry of any one else, at least that it ought to have appeared in the plea that their entry was necessary for the purposes mentioned in the license, which is not alleged in the plea.

Secondly; He insisted that the defendants ought to have concluded to the country, and not with *hoc parati sunt verificare*,

(a) Vid. *Moravia and Sloper*, M. 11 Geo. 2. ante 32.

they

they having insisted on matters of fact which are properly traversable; and that this is more than matter of form, and consequently that it may be taken advantage of upon a general demurrer.

1739, 40.

DENNETT
against
GROVER.

Wynne Serjt. for the defendants. This is not a matter of pleasure (a) and therefore different from the cases cited. Where a man grants to another a matter of profit or licenses him to do any thing which may be of profit to him, every thing which is incident and necessary for the obtaining of such profit necessarily passes by such grant or license. Quando aliquid conceditur, conceditur id sine quo illud fieri non possit. For this purpose he cited *Cro. Jac.* 377; *Wingfield v. Bell*; 1 *Rol. Abr.* 339. C. pl. 3; and 1 *Ventr.* 45. And he put the case that a man should license another to remove a stone of several hundred pounds weight off his ground, it would be ridiculous to say that he could bring no one else on the ground to help him, but that he must do it himself.

As to the second objection, he insisted that if it were wrong, yet being mere matter of form, it ought to have been particularly assigned as a cause of demurrer, and could not be taken advantage of on a general demurrer. But he said that it was very right, and better, and more for the advantage of the plaintiff (the plea containing several matters of fact) than if the defendants had concluded to the country.

I was clearly of opinion against the plaintiff in respect to both objections. As to the first; I agreed with *Wynne* that where a man is licensed to do a thing, it necessarily implies that he may do every thing without which that thing cannot be done; and unless a man could sell goods to himself, and be both buyer and seller, it was absurd to say that this was a license to *Steel* only to go himself into the house. Besides it is highly probable that he

(a) In *Hil. 13 Hen. 7. 13.* the distinction is taken between those licenses that are given for pleasure and those for profit, that the former are merely personal, but that in the other case the person to whom the license is given may take others with him; "Et issint si on me license à avoir

un arbre in son bois, mes servants justifieront le fier del arbre et l'entrer." The former branch of this distinction is also supported by a passage in *Finch's Law*, 16 and 17, and the latter by a case in *M. 13 Hen. 7. 10.*

1739, 40.

DENNETT
against
GROVER.

might want to take several persons along with him in order to assist in the sale. And this is sufficiently set forth in the plea; for it is alleged that all three *necessarily continued* in the house ten days to sell the said goods; and if their continuance therein were necessary, their entrance must certainly be so too, and is therefore sufficiently alleged. As to the case *Wickham v. Walker*, it has no resemblance to this.

As to the second objection; I thought it (if any) only matter of form, and that therefore no advantage could be taken of it upon this general demurrer. But I was of opinion that the conclusion (a) of the plea was right, and better than if it had concluded to the country, nay, I was inclined to think that if it had been otherwise, it had been wrong; for if the plea had concluded to the country, and the plaintiff had joined issue upon it, it would have been a complicated issue, in which several matters very distinct in their nature would have been put in one issue. But now the plaintiff had his choice either to traverse any of these facts separately, or to reply *de injuriâ suâ propriâ absque tali causâ*; whereby he would have put the whole plea in issue.

Fortescue, Aland, J. was of the same opinion; and said that if the defendant had concluded to the country it had been wrong.

Fortescue W. J. was of the same opinion; and said that here was a sufficient averment of the necessity, or if not the license implied it; but of this I doubted.

Per Curiam,

Judgment for the defendants."

(a) This seems to come within the general rule, *Co. Lit.* 303. a. that pleas in | the affirmative ought to be averred.

1739, 40.

ROBERT LADBROKE and WILLIAM GYLES *against*
JOSEPH JAMES.

H. 13 Geo. 2.
Wednesday,
Feb. 6th.

"CASE. The plaintiff declares on several promises for goods sold and delivered &c by them and one *Charles Baynton* deceased to the defendant; damage 20 l.

The defendant comes and defends the wrong and injury when &c; and pleads that the plaintiffs ought not to have execution of any damages against the defendant to charge his person, because he says that the said several causes of action in the said declaration mentioned accrued before the 1st of *January* 1736, *to wit*, on the 1st of *January* 1735, and that he the said defendant on the 1st of *January* 1736 was actually beyond the seas in foreign parts, *viz.*, at *Helvoetsluys* in *Holland*, and that he the said defendant afterwards, *to wit*, at a general quarter sessions of the peace holden for the city of *Bristol* and county of the same city at the Guildhall of the same and within the same city by adjournment on *Wednesday* the 9th of *August* 1738 before *Nathaniel Day* the Mayor &c Justices of the said city and county &c *was duly discharged from his imprisonment aforesaid*; and this he is ready to verify, wherefore he prays judgment if the plaintiffs ought to have execution against his person &c.

The plaintiffs reply that they ought not to be barred from having execution against the said defendant for the damages to be recovered to charge his person, because they say that the said *Joseph* did not surrender himself unto the gaoler or gaolers keeper or keepers of the King's Bench Marshalsea or Fleet or to the prison of such county where he last dwelt for the space of six months; and this they are ready to verify, wherefore they pray judgment &c.

The defendant demurs generally, and the plaintiffs join in demurrer.

Draper

In pleading a judgment of a Court of limited jurisdiction, it is necessary to state those facts that give that Court a jurisdiction; and having stated those, the party may allege generally that that Court gave such a judgment.

—The insolvent act 10 Geo. 2. c. gave the Court of Quarter Sessions power to discharge certain persons who had surrendered before a certain time: held that in pleading a discharge by a Court of Sessions it was necessary to allege that the party was in prison or had surrendered himself before that time.

—Saying that "he was duly discharged by the Court of Quarter Sessions from his imprisonment aforesaid" is not alone sufficient.

1739, 40.

LADBROKE
against
JAMES.

Draper Serjt. for the defendant insisted that the replication was not good; for he said that the Court of Sessions having discharged the defendant this Court could not inquire into the regularity of the discharge, of which they were the proper judges. And for this he cited the case of *Linwood v. Hopkins*, M. 8 Geo. 2, before Lord *Hardwicke* at Guildhall, where it being objected that proper notice was not given in the Gazette, he was of opinion that the Sessions were the proper judges of this, and that it could not be inquired into upon the trial; and the case of *Savage v. Field* (a), B. R. M. 9 Geo. 2., where the same thing was determined.

Bellfield Serjt. for the plaintiffs admitted that, if it had appeared that the Court had jurisdiction, their judgment must be taken to be right; and said that this was all that was determined in the case of *Savage v. Field*, and that it was held in that case that it was necessary to prove the surrender in order to shew that the Court had a jurisdiction. He insisted that it ought to have been set forth in the plea that the defendant surrendered himself in order to give the Court a jurisdiction, which it is not. Upon the former acts it was always considered necessary to set forth that the party was in prison in order to give the Court a jurisdiction; and by the last act a surrender is made to be equal and tantamount to a legal imprisonment. Unless therefore it appear that the party was legally in prison or surrendered himself according to the 10 Geo. 2., he insisted that the Sessions had no jurisdiction. He insisted likewise that the defendant ought to have confessed the action in his plea, before he pleaded in exoneration of his person. And he said that for ought that appeared the defendant might have been committed for a criminal cause, which is not within the act.

Draper Serjt. in reply admitted that in the case of *Savage v. Field* it was held that it must be shewn that the Justices had a jurisdiction, but endeavoured to distinguish the present case, because he said that by the stat. 2 *Anne* the party was obliged to plead an imprisonment, but that by this act he is not obliged to plead a surrender.

(a) *Rep. temp. Hardw.* 186.(b) See *Sollers v. Lawrence*, *post.* Tr. 16 & 17 Geo. 2.

But

But I was of opinion for the plaintiffs that the plea was not good, and therefore had no occasion to give any opinion upon the replication.

1739,40.

LADBROKE
against
JAMES.

I admitted that if it had appeared (a) that the Sessions had a jurisdiction, it would have been sufficient to have said generally that the Sessions had discharged him, and that we could not inquire into any facts necessary to be done by him in order to obtain his discharge, of which the Sessions were the only and the proper judges, and must be taken to have adjudged right. But as in the case where an imprisonment is necessary it must always be set forth (b) that the party was in prison in order to give the justices a jurisdiction, so I was of opinion that in this case it is equally necessary for the party to set forth that he surrendered himself, which by the last act is made tantamount to an imprisonment, but it is not set forth in the present plea that the party surrendered himself or that he was ever in prison; for it is only said that he was discharged *from his imprisonment aforesaid*, whereas no imprisonment was mentioned before. And I thought that the words of the last act did not warrant the distinction taken by *Draper*.

As to the objection that the defendant should have confessed the action, I did not think that there was much in it; for by not denying it and pleading only in exoneration of his person, I was of opinion that he had sufficiently confessed it.

Mr. J. Fortescue A. of the same opinion; and said that the plaintiffs might have demurred to the plea.

Mr. J. W. Fortescue of the same opinion.

• So judgment for the plaintiffs.”

(a) See *Sollers v. Lawrence*, *post*, Tr. 16 & 17 Geo. 2.

(b) See *Cotterel v. Hooke*, Dougl. 97, and *Marks v. Upton*, 7 Durnf. & East 305, where it is pleaded (in the first case under stat. 16 Geo. 3. c. 38., and in the

other under stat. 34 Geo. 3. c. 69.,) that the defendants were actually in custody on the respective days &c, and were duly discharged at the Sessions according to the statutes.

1740.

E. 13 G. 2.
Thursday,
May 8th.

THOMAS BELL *against* GEORGE WARDELL and JOHN
CUMMIN alias COMYNES.

Justification
(in trespass)
under a cus-
tom for all
the inhabit-
ants of a
town to walk
and ride over
a close of
arable land
at *all season-
able* times in
the year was
holden bad,
because it ap-
peared that
the trespass
was commit-
ted when the
corn was
standing,
though the
defendant
averred that
it was a sea-
sonable time.
—"Season-
able time"
partly ques-
tion of law
and partly of
fact.
—Replica-
tion de in-
juriâ suâ pro-
priâ &c bad,
when it puts
several dis-
tinct points
in issue.

THE opinion of the Court was thus given by

Willes Lord Chief Justice. "Trespass, for that the defendants on the 2d of *May* 1738 and at divers times between that day and the 12th of the same month broke and entered two closes of the plaintiff called *Sbieldfield* and *Little Sbieldfield* at the town and county of *Newcastle-upon-Tyne*, and with their feet trod down spoiled and consumed the plaintiff's grafs and corn there growing and with divers cattle trod down depastured ate up and consumed other grafs and corn of the plaintiff's there growing, and broke threw down and spoiled five perches of his hedges and five perches of his fences, and other wrongs &c; to the damage of 20*l*.

The defendant *Wardell* as to the force and arms and all the trespasss supposed to be done with bulls cows sheep and swine pleads not guilty; and as to the residue of the trespasss pleads specially that the places in which &c are *two closes of pasture* bounded (prout;) and that the said two closes time out of mind and until &c were lying together without any hedge or fence and were part and parcel of certain lands called and known by the name of *Sbieldfield*, and have been repaired to and used as a public place of resort for the inhabitants of the town and county aforesaid, and that within the said town time out of mind there hath been a certain ancient custom there used and approved, that the inhabitants of the said town time out of mind in every year at *all seasonable times* in the year have had the easement liberty and privilege and have used and been accustomed to have the easement liberty and privilege of walking and riding on horseback in the said closes for air and exercise for the benefit and preservation of the health of the inhabitants of the said town without any molestation or disturbance whatsoever. And the said defendant saith that on the said 2d day of *May* and before and ever since he was and still is an inhabitant of the said town, wherefore he on the said 2d day of *May* and at divers days and

times between that day and the 12th of the said month, the said several times in which &c *being seasonable times*, rode on horseback and walked in the said closes for air and exercise and for the benefit and preservation of his health; and because the said closes at the several times when &c were inclosed with the hedges and fences in the declaration mentioned so that the said defendant could not enter into the said closes on horseback without breaking and throwing down the said hedges and fences the said defendant at the several days and times when &c in order to enter into the said closes on horseback necessarily broke and threw down the said hedges and fences, and in walking and riding as aforesaid necessarily trod down and consumed with his feet in walking a little grass and corn there growing, and the said horses mares and geldings on which the said defendant rode in the said closes trod down and consumed and snatched and ate up a few morsels of grass and corn there growing, doing as little damage as might be, which are the same trespasses &c; and this he is ready to verify; wherefore he prays judgment whether the said plaintiff ought to have his said action against him &c.

1740.
BELL
against
WARDELL.

The defendant *Comyns* pleads the same plea, *mutatis mutandis*.

The plaintiff replies to both the pleas, and assigns a new trespass *in two closes of land* described to have different boundaries from those set forth in the defendants' pleas.

To this new assignment both the defendants plead the same pleas as before, only they do not say that the two closes are closes of pasture, but admit them to be two closes of land as they are called in the new assignment.

The plaintiff replies to both the said pleas *de injuriâ suâ propriâ absque tali causâ*, and this he prays may be inquired of by the country.

To this replication both the defendants demur, and for causes of demurrer shew that the plaintiff in his replication traverses and offers to put in issue all the matters alleged in the defendants' pleas, whereas he should only have traversed some single matter of

1740.

BELL
against
WARDELL.

of fact alleged in these pleas, and for that the said replication is complicated and informal.

The plaintiff joins in demurrer (a). On this demurrer it now comes before the Court for judgment.

The replication of the plaintiff to the defendants' pleas pleaded to the new assignment was admitted by the counsel for the plaintiff not to be good; and to be sure it cannot be supported for the reasons mentioned in the demurrer, it putting several different matters in issue; whereas the chief end and use of special pleading is to reduce matters to a single point. And therefore such a replication was held to be bad in this court in the case of *Cooper v. Monke* (b), and in the case of *Cockerill v. Armstrong* in this court *Trin.* 1738 (c); in which last case all the cases relating to such a replication are fully stated and considered.

But it was insisted by the counsel for the plaintiff that the pleas of the defendants are bad, and that therefore it is not material whether the replication be good or not. The objection to the pleas was that the custom is not laid generally at all times of the year, but only *at all seasonable times*, and that it appeared from the defendants' own shewing that the riding which they insisted on as a justification was not at a seasonable time; and that of this the Court were the proper judges, as in the case of a *reasonable time*, *reasonable fines*, customs and services, of which the Court are the proper judges (d). For what is contrary to reason cannot be consonant to law, which is founded on reason; and therefore the reasonableness in these and the like cases depends on the law and is to be decided by the Judges, as is held in *Co. Lit.* 56, b.; 59. b.; 4 *Co.* 27. b. the case of *Hobart v. Hammond*, *Cro. Jac.* 204, the case of *Stodden v. Harvey*, *Cro. Eliz.* 583, the case of *Makarell v. Bachelor*; where the Court on a demurrer took upon them to determine what was proper and necessary apparel for the defendant who was an infant and gentleman of the chamber to the Earl of *Essex*. These cases were not controverted: but it was

(a) This case was twice argued, the first time 14th Nov. 1738, and the second time on the 6th of May 1740 by *Bootle* Serjt. for the plaintiff and *Agar* Serjt. for the defendants.

(b) *Supra*, 52.

(c) *Supra*, 99. See the cases there referred to.

(d) See *Eaton v. Southby*, *supra*, 135. *Hil.* 12 *Geo.* 2. and the cases there referred to.

said

said that it was here averred to be a seasonable time, which was admitted by the demurrer, or at least that an issue ought to have been joined that it might appear on the evidence at the trial whether it was a seasonable time or not; for it was said that by "seasonable times" was meant in good weather when it did not rain snow or hail, and when it would be seasonable to ride out for the preservation of health, as the custom is laid to be. But to be sure the word "seasonable" will admit here of no such construction; for it is ridiculous to say that "unseasonable" was meant in respect to the person claiming the right; for if he has a general right, he is not bound to ride out but just when he pleases. But "unseasonable" must necessarily mean in respect to the owner of the soil; otherwise the custom would be a very strange one, that all the inhabitants of the town of *Newcastle* might ride over the plaintiff's corn and grass at all times of the year whenever they pleased, which would be to say that the inhabitants of *Newcastle* had a right to take away from the plaintiff all the profits of his own land.

1740.
BELL
against
WARDELL.

There is indeed a case in 1 *Lev.* 176, 177. *Abbot v. Weekly*, M. 17 Car. 2. B. R., wherein a custom (a) that all the inhabitants of a town had a right to dance at all times of the year for their recreation (b) in the plaintiff's close was holden to be a good

(a) Vid. *Lev.* 176. where it is stated as a prescription: and see note (b) *infra*.

(b) *Millechamp v. Johnson and others*; 12th of February 1746, B. C. Trespass for breaking and entering the plaintiff's close at *Colehill* and treading down and consuming the grass there growing. The defendants pleaded a custom for "all the inhabitants of the town of *Colehill* for the time being to have and enjoy the liberty and privilege of playing at any rural sports or games in the said close every year at all times of the year at their will and pleasure; and then justified as inhabitants "playing at rural sports and games therein &c." This custom was traversed in the replication. And after a verdict, establishing the custom, a motion was made to enter up

judgment for the plaintiff notwithstanding the verdict found for the defendants on the ground that the custom could not be supported in law, 1st, Because it was too general and uncertain, in not specifying what rural sport or game; 2dly, Because it was illegal and unreasonable, not being confined to *reasonable or legal times* of the year; and 3dly, Because there could have been no consideration for it, and it could not have had a legal commencement.

The case was argued by *Skinner King's* Serjt. and *Leeds Serjt.* for the plaintiff and by *Willes King's* Serjt. and *Wynne Serjt.* for the defendants; and at a subsequent day the rule was made absolute to enter up judgment for the plaintiff (1).

The

(1) See *Kirk v. Nowill*, 1 D. & E. 118; and *Selby v. Robinson*, 2 D. & E. 758.

1740.
BELL
against
WARDELL.

good custom: but it was after a verdict which found the custom; it was only in a close of *pasture*, for dancing, and *not riding*, and the court said that perhaps it might not be good upon a demurrer (a). And I own that if a general custom had been laid in the present case, considering that this is on a demurrer, and for riding and in arable land, I should have much doubted whether this were a good custom or not. But this not being the case, I need not give any positive opinion upon it.

But as the custom is laid here, if it were not a *seasonable* time the justification is not within the custom. Though the Court are the proper judges of this, yet in many cases it may be proper to join issue upon it. I mean in such cases where it does not sufficiently appear on the pleadings whether it were a seasonable time or not; and accordingly it is said in the before-mentioned case of *Hobart v. Hammond* that the reasonableness of fines must be determined by the Judges either on a demurrer or upon evidence laid before a Jury. For issues may be joined on things which are partly matters of fact and partly matters of law; and then when the evidence is given at the trial, the Judge must direct the Jury how the law is, and if they find contrary to such direction it is a sufficient reason for a new trial.

The Court being of opinion that the custom as laid extending to *any rural sports* was too general and uncertain. But they thought that there was no weight in the second or third objections; for that "all times of the year" must be taken to mean "legal and reasonable times of the year," and that this did not take away all the profits of the land; and that it might have had a legal commencement. MS. *Willes* Lord Chief Justice.

In a late case however, *Fitch v. Rawling and others*, 2 H. Bl. Rep. C. B. 393. a custom for all the inhabitants of the parish of *Steeple Bumpstead* in *Essex* "to play at all kinds of lawful games sports and pastimes in the plaintiff's close at all reasonable times of the year at their will and pleasure" was holden to be a good custom, though a similar custom "for all persons for the time being being in the said parish &c" was decided to be bad.

(a) But this part of the opinion of the Court was given (not in answer to the principal objection, which was that the prescription was bad, but) in answer to the second objection that the right or easement should have been claimed by way of custom not prescription; though indeed it appears extraordinary that *the verdict* should have removed either of the objections.—As to the second objection in that case; see *Gateward's case*, 6 Co. 59. b. *Grimstead v. Marlowe*, 4 D. & E. 717; and *Hardy v. Hollyday*, E. 5 G. 3. C. B. there cited 718; where the distinction is taken between an interest, a profit a prendre in alieno solo, as a right of pasture &c, and an easement, as a right of way; that for the former the party must prescribe in a *que estate*, (except in the case of copyholders against their lord) but that the latter may be claimed by custom.

But

But in the present case there is sufficient matter set forth in the pleadings for the Court to determine that it was not a seasonable time; and therefore an issue would only put the parties to an unnecessary expence. For the trespass is admitted to be done upon arable land between the second and twelfth of *May*, when corn was growing on the land; and the averment that it was at a *seasonable time* cannot alter the case, since such averment is inconsistent with the whole tenor of their plea, and the demurrer will not help the plea if inconsistent with itself. Supposing, for example, that the defendants had insisted on a right of common every year from the time that the corn is cut and carried off until it is sown again, and then under this custom had justified putting their cattle on the plaintiff's close and eating up his corn there growing, averring that the corn was all carried off before their cattle were put in: such a plea would be plainly absurd and inconsistent, and yet that is exactly a parallel case to the present.

But it was said that in the present case the corn might be sown at an unseasonable time to prevent the defendants riding there according to the custom; but the times in which the trespass is here admitted to have been done, viz. between the 2d and 12th of *May*, shew this to be otherwise: but if it had been so, the defendants in such case ought to have insisted on it in their pleas.

For these reasons we are all clearly of opinion that judgment must be for the plaintiff (a)."

(a) See *Selby v. Robinson*, 2 D. & E. 758, where it was holden that a custom for the poor necessitous and indigent householders residing within the township of *Whaddon* to cut and carry away rotten boughs and branches in a close was bad, on account of the uncertain description of persons in respect of whom the right was claimed.— See also *Fitch v. Rawling*, 2 H. Bl. Rep. C. B. 393. sup. 206. n.

1740.

BELL
against
WARDELL.

1740.

T. 13 & 14

G. 2.

Thursday,
June 19th.

One tenant in common cannot maintain an action of account at common law against another as his bailiff, unless that other were appointed bailiff; but under the stat. 4 & 5 An. c. 16. he may.

—In such action on the statute the plaintiff must state in his declaration that he and the defendant are tenants in common, and that the defendant has received more than his share &c. 14 Vin. Abr. 513, 514. S. C.

WHEELER *against* HORNE.

THIS was an action of account.

The declaration stated that the *defendant was bailiff of the plaintiff* of one twelfth part (the whole in twelve parts to be divided) of certain premises therein described in the parish of *Simonward* in *Cornwall* from the 1st of *April* 1720 to the 1st of *October* 1734, and received the annual profits thereof for all that time, to render a reasonable account thereof to the plaintiff when he should be requested, yet that, though often requested, he had not rendered a reasonable account to the plaintiff, but refused &c; to the plaintiff's damage 20*l.* &c.

The defendant pleaded that he never was bailiff or receiver of the plaintiff for the premises mentioned in the declaration, to render an account thereof to the plaintiff, in manner and form as the plaintiff above declared &c; on which issue was joined.

On the trial of the cause in the county of *Cornwall* it was proved that the plaintiff and defendant were tenants in common of the premises, the plaintiff of one twelfth part, and the defendant of the other eleventh parts, for the time mentioned in the declaration. That the defendant had been in the possession of and lived upon the premises, and took to his own use during all that time all the issues and profits of the whole twelve parts, about 8*l.* a-year, and refused to account with or to pay the plaintiff her share. But the plaintiff did not prove that she had ever appointed the defendant her bailiff of her twelfth part. The jury found a verdict for the plaintiff, subject to the opinion of

Mr. J. W. Fortescue; and the question agreed to be reserved was whether, on the above facts so proved, the declaration were sufficient to maintain the action against the defendant as bailiff to the plaintiff of her twelfth part.

The case was argued in *Mich.* 13 *Geo.* 2. before Mr. J. W. Fortescue, who determined in favour of the defendant; and

then the case was referred to the consideration of the Court of Common pleas. It was argued on the 19th of June 1740 by *Hussey* Serjt. for the plaintiff, and *Draper* Serjt. for the defendant; and on a subsequent day

1740.
WHEELER
against
HORNE.

Willes Chief Justice delivered the opinion of the Court (after stating the case) as follows.

“An action of account would not lie by one tenant in common against another as his bailiff at common law, unless he were so particularly appointed. It was so expressly said in *Co. Lit.* 172. a.; and there is no case to the contrary. One indeed was cited from *Bro. Abr.* “*Account*,” pl. 20. 47 E. 3. to shew that if two were jointly possessed of a horse, and one of them sell him, an action of account will lie against him for the share of the money. But that is quite a different case from the present, which is for the receipt of the rents and profits of a real estate; 1st, because that was the case of a *personal chattel*; and 2dly, because there by the sale and turning the thing into money the joint interest was gone, and each had a separate interest for a sum certain: and I should think that not only an action of account, but even an action on the case for money had and received, might be well brought against him for it. So that I think it is clear that this action would not lie at common law, but must be maintained, if at all, on the statute 4 & 5 Anne, c. 16.

The words of that act (a) are that from and after &c actions of account may be brought and maintained by one joint-tenant or tenant in common against the other as bailiff *for receiving more than comes to his just share or proportion*; and the auditors appointed by the Court, where such action shall be depending, are to administer an oath, and to examine the parties touching the matters in question &c.

Though an action of account therefore may be brought by one tenant in common against another since this statute, yet it is an action of a very different nature from an action of account against a bailiff at common law;

(a) Sect. 27.

1740.

WHEELER
against
HORNE.

First, Because a bailiff at common law is answerable not only for his actual receipts but for what he might have made of the lands without his wilful default, as is expressly held in *Co. Lit.* 172. a., and in many other books: but by the plain words of the statute a tenant in common, when sued as bailiff, is answerable only for so much as he has actually received more than his just share and proportion.

Secondly, Because the auditors in an action of account at common law could not administer an oath unless in one or two particular cases: but by the statute the auditors may examine the parties on oath. Now as the judgment in both actions must be in general quod computet, how can the auditors tell in what manner he is to account, or whether they are to examine on oath or not, unless it appear by the record in what capacity he is sued and what sort of action this is? It was said that such a suggestion might be made on the record: but I believe no such suggestion was ever heard of. But the declarations since the statute have always set forth that the plaintiff and defendant are tenants in common, and that the defendant has received more than his share. To be sure, as this is a general statute, it was not necessary to set it forth or to refer to it: but the plaintiff should have set forth so much as to bring his case within the statute; and it is material that in the present case the defendant has pleaded that he was not bailiff to the plaintiff. The bailiff set forth in the declaration must be taken to be a bailiff by appointment, and it is admitted that the defendant was not so appointed; so the defendant has made good his plea.

We are therefore of opinion that the verdict must be set aside, and that the plaintiff must pay the costs of a nonsuit according to the rule."

1740.

GOODTITLE on the Demise of JOHN GURNALL against
WOOD.Trin. 13 & 14
Geo. 2.
Monday,
June 23d.

THIS came before the Court on a case reserved at the assizes at *Appleby* in *August* 1739.

T. Gurnall, being seised in fee of the premises in question, by will dated 30th of *March* 1722, devised to *Dorothy* his wife for her life, remainder to his son *John Gurnall* and his heirs, he or his mother paying thereout to *Frances* and *Dorothy Harrison*, his wife's daughters, 40*l.* a-piece when they should attain their respective ages of twenty-one years; but if his son *John Gurnall* should die before he attained the age of twenty-one years, then he devised the said premises to his wife's son *William Harrison* and his heirs, he paying out of the same the further sum of 20*l.* to his sister *Frances* at the end of the first year, and the sum of 20*l.* to his sister *Dorothy* at the end of the second year after his entrance into the said premises. After the devisor's death, *Dorothy* the widow enjoyed the premises during her life, and she died on the 28th of *June* 1726: on her decease *John Gurnall*, the son, entered, and received the rents and profits until his death, on the 24th of *February* 1736, which was before he attained the age of twenty-one years. *W. Harrison*, the devisee, died after the death of the widow and in the lifetime of *John Gurnall*, the son, to wit, on the 1st of *April* 1733, leaving his said two sisters *Frances* and *Dorothy* his coheiresses, the elder of whom married *T. Wood* the defendant: *W. Harrison* was never in possession. *John Gurnall*, the lessor of the plaintiff, is cousin and heir of *John Gurnall*, the devisee, namely, son of *John Gurnall* who was the elder brother of *T. Gurnall*, the devisor. The defendant *Wood* has been in possession of the premises ever since the death of *John Gurnall* the devisee. The question reserved was whether the heir of *W. Harrison* was entitled under the said devise, or the lessor of the plaintiff as heir at law to *John Gurnall* the son.

A devise to A. and his heirs, but if he die before twenty-one then to B. and his heirs, is a good executory devise to B.; and if B. survive the devisor, it will descend to B.'s heir, though he die before the contingency happens, ff. the death of A. before twenty-one.

7 Mod. 302.
oct. edit.
8 Vin. Abr.
112. pl. 28.
S. C.

The

1740.

GOODTITLE
dem. GUR-
NALL
against
WOOD.

The case was argued on the 12th of *June* 1740 by *Bootle* Serjt. for the plaintiff, and by *Birch* Serjt. for the defendant; and on this day the opinion of the Court was delivered, as follows, by

Willes Lord Chief Justice (after stating the case.)—"This is a plain executory devise. The question is no more than this, if there be an executory devise to *A.* and his heirs, and *A.* survive the devisor but die before the contingency happens, whether any thing can descend to his heir? To shew that nothing can descend was cited the case of *Brett v. Rigden*, *Plowd.* 345: but that case was very different from the present; there was a devise to *A.* and his heirs, *A.* died before the testator, and it was holden that the heirs (*a*) could take nothing; and for this plain reason, because, if they took, they must have taken by way of limitation, which they could not do unless there were something in the ancestor at the time of his death, and there was not because he died before the devisor. But in the present case *W. Harrison* survived the devisor.

The plaintiff's counsel then compared the case of an executory devise to a bare possibility, and insisted that a bare possibility before the contingency happened would not descend and could not be granted or devised, and that a recovery would not bar it; for which purpose they cited *Fulwood's* case, 4 *Co.* 66. *b.*; *Marsh's Rep.* 136, 7; *Pells v. Brown* in *Cro. Jac.* 590, and in several other books. But these were cases before the notion of executory devises came in, or at least before they were well established and understood. Besides, even as to possibilities, the contrary has been since holden in several cases; particularly in *Goring v. Bickerstaff*, *Pollexf.* 32, and *Veizy v. Pinwell*, *ib.* 44;

(a) *Elliott v. Davenport*, 1 *P. Wms.* 84; *Goodright v. Wright*, 1 *Str.* 25; *Busby v. Greenplate*, *ib.* 445; *Ambrose v. Hodgson*, *Dougl.* 337; *Denn d. Radclyffe v. Bagshaw*, 6 *D. & E.* 517; *S. P.*—Nor is there any difference in this respect between a devise to the heir at law of the devisor and to his heirs or the heirs of his body, and a devise to a stranger and to his heirs &c. *Hutton v. Simpson*, 2 *Vern.*

722, reported in *Gilb. Rep. in Equ.* 115, 120, and in *Prec. in Chanc.* 439, by the name of *Sympton v. Hornsby*; and *White v. Warner* lessee of *White*, *B. R. Mich.* 22 *G.* 3. in error from *Ireland*, cited in 6 *D. & E.* 518.—Nor is it material that the devisor confirmed his will by a codicil made after the death of the first devisee, and after he knew of that death; *Doe d. Turner v. Kett*, 4 *D. & E.* 601.

where it was held that a possibility may be granted or devised (a); the same has also been held in many other books.

1740.

GOODTITLE
dem. GUR-
NALL
against
WOOD.

But if it were otherwise in the case of bare possibilities, of late years the doctrine of executory devises has been settled. They have not been considered as bare possibilities, but as certain interests and estates, and have been resembled to contingent remainders in all other respects, only they have been put under some restraints to prevent perpetuities; as, first, it was held that the contingency must happen within the compass of a life or lives in being, or a reasonable number of years; at length it was extended a little further, namely, to a child (b) in ventre sa mere at the time of the father's death, because, as that contingency must necessarily happen within less than nine months after the death of a person in being, that construction would introduce no inconvenience; and the rule has in many instances been extended to twenty-one years after the death of a person in being, as in that case likewise there is no danger of a perpetuity. But in all other respects executory devises have been always resembled to contingent remainders; and the reason, on which they were first instituted, plainly shews that they ought so to be. For the reason of their institution was this, when it was plain that the devisor intended a contingent remainder, but it could not operate as such by the rules of law, in favour of wills, and that the intent of testators (who are supposed to be inopes concilii) might take place, these sort of estates were holden to be good as executory devises, because intended to be contingent remainders. They ought therefore to take place as such as far as is consistent with the rules of law. And if this were a contingent remainder there is no doubt but that it would be good.

That in these sorts of executory estates a contingent interest may vest before the contingency happens, so as to go to the heirs or representatives of a person dying before such contingency

(a) See *Selwyn v. Selwyn*, 2 Burr. 1131, and 2 Bl. Rep. 251; *Goodright d. Larmer v. Searle*, 2 Will. 29; *Moor v. Hawkins* in Chancery 1765, coram Lord Northington, cited in 1 H. Bl. Rep. 34; *Roe d. Noden v. Griffiths*, 1 Bl. Rep. 605; and *Jones and Others v. Roe*, lessee of *Perry*, B. R. in error; 3 D. & E. 88. affirming the judgment in C. B. 1 H. Bl. Rep. 30.

(b) See *Long v. Blackall*, 7 D. & E. 100.

1740.

GOODTITLE
dem. GUR-
NALL
against
WOOD.

happens, was fully established in the case of *King v. Withers* (a), which was determined by Lord *Talbot* in July 1735; and his decree was afterwards affirmed in the House of Lords. The case was this; *A.* gave by his will to his daughter *B.* at her age of twenty-one or marriage 2500 *l.*, and if his son *C.* died without issue male of his body that his daughter should at her age of twenty-one years or day of marriage, which should first happen, have and receive 3500 *l.* over and above the 2500 *l.*: the daughter lived to be married and to be twenty-one, but died before her brother and consequently before the contingency happened; afterwards the brother died without issue male, and Dr. *King*, who had married the daughter, as her administrator and representative brought his bill for the additional sum of 3500 *l.*, and had a decree for it; and as this sum was charged on lands many cases were cited to shew that a contingent interest as well in a real as in a personal estate might vest so as to be descendible or transmissible before the contingency happened. But as this is plainly agreeable to reason, and as Lord *Talbot* and the House of Lords were clearly of this opinion and made it the foundation of their judgments, it would be but mispending time to mention all the cases that were cited. With regard to the case of *Marks v. Marks*, reported in *Prec. in Chancery* 486, determined by Lord Chancellor *Macclesfield* with the assistance of the Master of the Rolls and which was cited in the arguments, though it is a very good authority, yet as it was determined on a principle not applicable to this case, there is no occasion to pray it in aid of the present case.

But this doctrine being established, it is plain that the heir of *W. Harrison* is entitled in the present case, and consequently that the defendant must have the postea."

(a) *Cas. temp. Talb.* 117; 3 *P. Wms.* 414; 2 *Eq. Cas. Abr.* 656. pl. 10; 4 *Bro. Parl. Cas.* 228.

1740.

DALLING *against* MATCHETT.

"SKINNER Serjt. and *Prime* Serjt. shewed cause against a rule for setting aside an award. The award was made pursuant to a rule of nisi prius, entered into at the last *Lent* assizes holden for the county of *Norfolk*, which was afterwards made a rule of this court.

The award was to be made on or before the first day of *Trinity* term; and the reference was to Mr. *Britiff*, Mr. *Howse*, and Mr. *Workhouse*, of all matters in difference between the parties, so as they or any two of them made their award by the said time. Mr. *Britiff* and Mr. *Howse* made their award in writing and duly signed and delivered it on the 31st day of *May*; and *Trinity* term this year began on the 6th of *June*. Mr. *Workhouse* was in *London* from the time of the rule until after the award made, and never attended at any of the meetings of the referees which were holden at *Norwich*.

The objections to the award were,

1st, A defect of authority in the two arbitrators, as Mr. *Workhouse* was not present at any of the meetings, nor ever agreed to take upon him the burden of the reference.

2dly, That the award was obtained by undue means, and was void by the stat. 9 & 10 *W. 3. c. 15*.

3dly, That it was an unjust award on the merits.

The action was an action on the case for tolls for vessels passing through the plaintiff's locks to the defendant's mill. The arbitrators awarded that the defendant should pay to the plaintiff 124 *l.* 10 *s.* in full satisfaction of all matters in difference between them, and that they should execute mutual releases to each other. Several affidavits were read on both sides.

It was insisted by *Belfield* Serjt. and *Umlin* Serjt. for the defendant,

1st, That, though they admitted that the award might be good though made and signed by two of the arbitrators only if the

M. 14 G. 2.
Monday,
Oct. 27th.

When a cause is referred to three persons, and they or any two of them are empowered to make an award, an award made by two of them is good if the third had notice of the meetings &c.

—But if he had no such notice, then such an award is bad. Barnes 57. S. C. 4to. edit.

1740.
 DALLING
 against
 MATCHETT.

the third attended and were present at the meetings, according to the case of *Sallows v. Girling*, Cro. Jac. 277., which was cited for the plaintiff and agreed to be law, yet that in the present case the absence of Mr. *Workhouse* who never attended at any of the meetings, and who had sworn that he had no notice of them, made the award bad, or at least that it was sufficient evidence of partiality in the arbitrators to proceed without him, especially when they had notice from the defendant (as was proved by an affidavit) not to proceed; that therefore for this reason the award ought to be set aside, even though they had had an authority to make it.

2dly, As evidence of partiality, they insisted on several matters which were set forth in the defendant's affidavits, but which were fully answered by the affidavits for the plaintiff; so the Court had no regard to this objection.

3dly, They insisted that the award was unjust, because it had awarded mutual releases, and yet had no regard to a demand of the defendant, which he swore by his affidavit that he had against the plaintiff. The demand sworn to was that during the twelve years that he had been miller he had suffered 300*l.* damage by the diversion of the water, and by reason that the plaintiff's locks were not kept in such good repair as they ought, but did not pretend that he had ever brought his action against the plaintiff or made any demand before this reference for such damage. And it was fully proved by the plaintiff's affidavits that on the 23d of *May*, when the first meeting of the referees was holden, the defendant's attorney desired time to produce witnesses to prove these damages, and had time given to him till the 30th of *May* to produce such witnesses, but that he did not appear at the meeting or produce any witnesses, and this by the defendant's express order. For these reasons, and because the Court on motions of this sort never enters into the merits of the award, unless it appear to be unjust upon the face of it, the Court likewise had no regard to this objection.

And as to the first objection, which was of the greatest weight, and which deserved some consideration, *The Court were of opinion,*
 where

where the submission was worded as in the present case, that two may make an award without the other provided the third has due notice of the several meetings appointed and of the several matters referred to them, otherwise the award will be bad; as is the daily practice in the court of King's Bench, where a power is given to a certain number of persons in a corporation, or to the major part of them, if the whole number (except one) meet and all agree, yet the act is not good, if that one were not duly summoned and had no legal notice of the meeting (a). For though it has been often said if that one had been present, he could not by his vote have turned the majority the other way, when all the rest were unanimous, it has always received this answer that every one has a right to argue and debate as well as to give his vote, and it is possible at least that the person absent may, if he had been present at the meeting, have made use of such arguments as may have brought over a majority of the rest to be of his opinion. The same reason holds in the case of arbitrators, and therefore there ought to be the same rule.

The question therefore in the present case is only a question of fact; if Mr. *Workhouse* had not due notice of the meetings of the other arbitrators, their award is certainly not good: but if either by obstinacy, or at the desire of the defendant, or being hindered by business, absented himself from such meetings, having had due notice thereof, we are of opinion that the award is good. And upon the affidavits we were clearly of opinion that he had due notice, though in his own affidavit he has attempted to swear the contrary. And therefore we are of opinion that the award is good. Otherwise it would be in the power of one of the parties to trick the other, and entirely to defeat him of the benefit of the reference; for though he allowed the other to name two of the arbitrators, yet by naming a third who (he was sure) would not or could not attend, no arbitration could be made.

It was alleged that the defendant's attorney offered to enlarge the rule till Mr. *Workhouse* could attend: but it appeared

(a) Vid. *Musgrave v. Nevins*, 1 Str. 584; and 2 *Ld. Raym.* 1359; *Kynaston v. The Mayor Aldermen and Assistants of* *Shrewsbury*, 2 Str. 1051; and *R. v. May*, 5 Burr. 2682.

1740.

DALLING
against
MATCHETT.

1749.
DALLING
against
MATCHETT.

by the affidavits that this offer, if ever made, was not till after the several meetings, and not till after the award was made (if not actually signed,) and that the defendant wrote a letter on the 28th of *May* to his attorney to another purpose, commanding him not to attend at all, plainly to defeat the plaintiff of the benefit of this reference; we had therefore no regard to this offer. But it appearing to us that the complaint against the award was extremely frivolous and vexatious, we discharged the rule with costs."

It appears that on the next day, *Tuesday, October 28th*, another motion was made in this cause; as follows;

The Court will not grant an attachment for non-payment of a sum of money awarded and which was demanded when a rule for setting aside the award was pending.

"*Prime Serjt.* moved for an attachment against *Matchett* for not paying the 124*l.* 10. to *Dalling* in pursuance of the said award, on an affidavit of a demand and refusal in *July* last: but

We thought that the plaintiff should not have made a demand of the money when there was a rule nisi depending for setting aside the award; therefore we directed the plaintiff to demand it again, and if the defendant refused payment then to move again for an attachment."

M. 14 G. 2.
Monday,
Nov. 10*h.*

JAMES LAMBERT against THOMAS STROOTHER.

To a plea of liberum tenementum the plaintiff may reply that the place in question is the soil and freehold of the plaintiff and not the soil and freehold of the defendant.

—When the plaintiff names the close in his declaration in trespass, whether the defendant can plead liberum tenementum? *2d.*

THE opinion of the Court was delivered as follows by

Willes, Lord Chief Justice. "Trespass, for that the defendant on the 1st day of *March* 7 *Geo.* 2. and at divers times between that and the 1st day of *December* 12 *Geo.* 2. broke and entered six closes of the plaintiff's called *The Fold, The Woodgard, The Croft, The Garden, The New Land*, and *The Chappel Green*, at *Horsforth*; and trod down and consumed the grass and corn there growing with his feet, and trod down and consumed his grass and corn with his cattle, and subverted and spoiled his soil with the wheels of carts and carriages, and broke threw down and spoiled his hedges fences and walls, and took and carried away ten loads of his stones, &c. Damage 20*l.*

The

The defendant by leave of the Court pleads three pleas;

1st, As to all the trespasss, except in *The Chappel Green*, not guilty; and as to all the trespasss laid in that close he says that the said close at the several times when &c was the soil and freehold of him the said *Thomas* &c; and this he is ready to verify &c.

1740.
LAMBERT
against
STROOTHER.

2dly, That the said close called *Chappel Green* at the several times when &c was the soil and freehold of the defendant, Sir *Walter Cawverley* Bart., and six others (whom he names in his plea,) and so justifies in his own right and as their servant and by their command; and this he is ready to verify &c.

3dly, That the said close called *The Chappel Green* at the said several times when &c was and is parcel of the King's highway leading from *Addle* to *Calverley*, and so justifies the several other trespassses, and the breaking down of the hedges fences and walls, because the same was inclosed, which was a nuisance &c; and this he is ready to verify &c.

To the first plea the plaintiff replies that the close called *The Chappel Green* at the several times when &c was the soil and freehold of the plaintiff and not the soil and freehold of the defendant, as the said defendant hath above alleged, and this he prays may be inquired of by the country; and the said *Thomas* likewise.

To the second plea he replies exactly in the same words, *mutatis mutandis*, and on this he tenders an issue, but no issue is joined.

To the third plea he replies that the said close called *The Chappel Green* containeth one rood of land, which said rood before the time when &c lay uninclosed, and at the said several times when &c was the soil and freehold of the plaintiff, wherefore for about four years before the said time when &c he inclosed the same with hedges &c, and held the same inclosed ever since until &c, as it was lawful for him to do; without this that the said close called *The Chappel Green* at the said several times when &c was or is parcel of the King's highway leading &c, as the said plaintiff hath above alleged; and this he is ready to verify &c.

The

1740.
 LAMBERT
 against
 STROOTHER.

The defendant demurs to the second replication, and shews for cause that the replication is a negative pregnant and contains argumentative and double matter which is not issuable &c. On the third replication he tenders an issue to the plaintiff; and the plaintiff in his surrejoinder joins issue thereupon, and joins in the demurrer to the second replication.

This case comes before the Court only on the demurrer of the defendant to the replication of the plaintiff to the second plea; for though it was said in the argument (a) of the case that the two issues had been tried and something was said how costs would go according to the statute 4 & 5 Anne, c. 16, that matter is not now before the Court, but it comes on singly on the demurrer.

The objection to the replication as stated in the demurrer, that it is a negative pregnant and contains argumentative and double matter which is not issuable, is scarcely intelligible; for how it can be a negative pregnant, or how it contains argumentative matter, I own I do not understand. But the only sensible objection to it is that it is double and puts two matters in issue, which ought not to be done; for the end of special pleading is to reduce matters to a single point.

It might be doubted whether assigning this as a cause of demurrer in this general manner be sufficient according to 1 *Salk.* 219, and 1 *Lutw.* 4., where it was holden that it is not sufficient to say placitum duplex est or duplicem continet materiam. But in order to come at the merits, I will admit that the cause of demurrer is sufficiently set forth.

To shew that such pleas and replications, which contain double matter are not good, several cases were cited: but I shall take no notice of them, because the law is undoubtedly so; but the question is upon the fact, whether this replication be double and puts two matters in issue or not.

(a) It appears that this case was argued for the defendant and by *Bootle* Serjt. for on the 7th of February 1739, 1740, and the plaintiff. on the 5th of May 1740 by *Draper* Serjt.

Upon

Upon this head a great many cases were cited, and which my Brother *Draper* said appeared to him at first to be so very intricate and inconsistent that he was a great while before he could find out the meaning of them, or reconcile them one with another, but that at last with great difficulty he had found out a distinction which reconciled them all. And I must own that I do not understand them yet, and am not able to reconcile them, and therefore I shall lay most of them aside, because I think I can determine this point with the assistance of but very few of them. If indeed there were any case in point, I should think myself obliged to take notice of it, but I cannot find any such case.

1740.
LAMBERT
against
STROOTHER.

As for the cases in replevin in *Owen* 51, *Gouldsb.* 65, and 1 *Bulstr.* 48, they are no authorities in the present case, because trespass and replevin are in their nature as different actions as possible, as the right must necessarily come in question in replevin if the defendant thinks proper to avow, and the plaintiff in his plea in bar must not only shew his right, but likewise traverse the right of the avowant. Whereas trespass is a possessory action, founded merely on the possession, and it is not at all necessary that the right should come in question.

The only cases that I can find in trespass that look like the present case are those of *Rickman v. Coxe*, *Cro. Jac.* 594, *Witham v. Barker*, *Yelv.* 147, and *Hustler v. Raines*, 2 *Lutw.* 1399, 1400 &c. As to the case in *Cro.*, it does not appear that any judgment was given. The case in *Yelv.* is different from this, because the plaintiff there did not traverse the freehold but the command; and the objection was not that the replication was double, but that the plaintiff had not set forth a good title; and I lay but little stress on this case as reported, because it is not necessary that a plaintiff in trespass should set forth any title, and so it is expressly held in the case of *Radborne v. Kennadale*, 3 *Salk.* 354, where a distinction is made between trespass and replevin in this respect. And the only reason that is given by *Yelverton* for the opinion of the Court is that the plaintiff might as well have said "*Robin Hood in Barnwood flood*": *Yelverton* was counsel in that case; and I am satisfied that it was his own witticism which he has been pleased to father on the Court, and

1740.

LAMBERT
against
STROOTHER.

that no Judge when he was solemnly pronouncing judgment could make use of so ridiculous an expression.

The case in *Lutwich* goes upon another point: but it is said that the plaintiff's replication was ill; and that he ought to have replied just in the same manner as the plaintiff has done in the present case. But this not being the judgment in the case, but only an obiter dictum, I do not rely much on this authority.

In order to make the present case intelligible, and to shew the reason of our judgment, I shall consider a little how these pleas of freehold in actions of trespass came to be at first introduced; for they seem a little absurd, and if they had not prevailed for so many years, but it was at present a new matter before the Court, I should be of opinion that it is not a good plea. For every plea in bar (admitting the fact that is pleaded to be true) ought to be a full bar to the action: but this is plainly not so; for though the place in question be the defendant's freehold, the plaintiff may have a good cause of action; as if he hold by lease under the defendant, or under another person who conveyed the reversion to the defendant, or even though he has no right at all if he has been in quiet possession a great while, for in that case the person having a right must bring an ejectment and cannot enter upon him by force. But, notwithstanding this, as these pleas have so long obtained (a), it would be too much to over-rule them generally, but I think even still in some cases (b) they ought not to be held to be good pleas.

The reason why they were at first introduced seems to be this; anciently most declarations of trespass were general, only for breaking and entering the plaintiff's close in such a place, without giving any name to the close: but now always in

(a) But the defendant may give evidence of title under the plea of not guilty; *Bartholomew v. Ireland*, Andr. 108; and *Dodd v. Kyffin*. 7. Durnf. & East 354.

(b) They are not allowed in actions of trespass for taking chattels. To trespass for taking and carrying away the plaintiff's trees, the defendant pleaded that the place where the trespass was supposed to have

been committed was his freehold, and so justified &c: "And upon a demurrer to this plea it was adjudged ill; for this is no plea to a trespass de bonis asportatis, but peculiar only and proper to a trespass quare clausum fregit." *Aylstone v. Hutchinson*, Carth. 176. *Elwis v. Lombe*, 6 Mod. 117. S. C.

this

this court, by reason of the rule made *Mich. 1654, Book of Rules, p. 38.* (and I believe most commonly in *B. R.*) the plaintiffs in their declarations in trespass set forth the names of the closes as the plaintiff has done in the present case.

1740.
LAMBERT
against
STROOTHER.

But formerly when a plaintiff only declared generally, it was thought a great hardship on a defendant to be obliged to answer such a general charge; for if the plaintiff had a large estate in the township the defendant could not tell in which of the closes he would assign his trespass, and therefore they gave the defendant leave to plead the general issue to oblige the plaintiff to make a new assignment, and ascertain the place in his replication: if he did not, and the defendant pleaded generally, as he might do, that the place in question was his freehold, the hardship would be turned on the plaintiff; for then if the defendant could prove any one place in the township to be his freehold, the plaintiff would be gone, as is expressly held in the case of *Elwis v. Lombe*, 6 *Mod.* 117, 18, and 19 (a). And it is said in that case and likewise in several other cases that when the plaintiff is general in his declaration the defendant shall be allowed to be as general in his plea; these pleas are therefore called common bars, sometimes bars at large, and sometimes blank bars, as in *Cro. Car.* 384, *Cro. Jac.* 594, and several other books. And as such it was doubted whether they were traversable or not in the case in *Cro. Jac.* 594; two Judges, against one, were of opinion that they were not, but no judgment was given. I think it is very clear that they are traversable, and I wonder whence the doubt could arise; for if they were not traversable, the defendant might at any time bar the plaintiff by such a plea, by pleading that the locus in quo was called by such a name and that it was his freehold mentioning the very name of the place where the trespass was committed; for in that case if the plaintiff could not traverse it, he must necessarily lose his cause, for he cannot make a new assignment when the defendant gives the place a right name.

That this was the reason of these pleas originally appears from the words of the rule before mentioned, which says that for the

(a) Vid. *Goodright d. Balch v. Rich* | & *Eggt* 335; accord:—*Dy. 23. b. cont.* and another; per *Lawrence J. 7 Durnf.*

future

1740.
 LAMBERT
 against
 STROOTHER.

future the declaration may mention the place certainly *and so prevent the use and necessity of the common bar and new assignment.*

As these were the reasons for admitting such a plea as this, I doubt very much whether this be a good plea in the present case where the plaintiff has named the closes in his declaration. The reasons for this plea do not hold here; there is no hardship on the defendant, and the plaintiff has ascertained the place; nor can the plaintiff make a new assignment in his replication; if he did, it would be a departure in pleading. If therefore it were necessary in this case to give an opinion upon this point, I am inclined to be of opinion (as at present advised) that the plea is not good (a).

But we being all of opinion that the replication is good, and a proper issue tendered, there is no occasion to give a positive opinion on the plea. If only one single matter be put in issue by this replication, videlicet, whether it be the freehold of the defendant or not, it must be admitted that the replication is good; and I think clearly that this is the only thing that is put in issue by this replication, and that the other words, "that it is the freehold of the plaintiff," are either to be rejected as surplusage or to be considered only as an inducement.

Put the words only thus, and the matter will still be plainer; let the plaintiff say that it is his freehold, absque hoc that it is the freehold of the defendant, in that place it would be plainly only an inducement, and yet that it is exactly the same case as the present. For, as I shewed before in a former case, the distinction between traverses and denials which we meet with in some of the books is a distinction without a difference; for they are exactly the same thing.

(a) See 14 Hen. 8. 4. pl. 3; 14 Hen. 8. 24. pl. 3; and Bro. Trespas, pl. 168. But see contr. 15 Edw. 4. 23 and 24; Hob. 16; and the opinion of Blackstone J. in Martin v. Kesterton; 2 Bl. Rep. 1089 in cases where the writ is general. It is true that in the rules of Court of C. B. made in 1654, f. 19. it is ordered that "The common bar and new assignment

be foreborne where the declaration contains the certainty equivalent to a new assignment:" but quære how far a rule made by one of the Courts can control the general law of the land, or how a plaintiff can avail himself of this rule in a superior Court to which the record may be removed by writ of error?

And it cannot be said that this is an immaterial issue: For the plaintiff may have no cause of action though the place in question be not the defendant's freehold, because when the defendant has put his case upon this, he is estopped afterwards to insist on any thing else; if he did, it would be a departure in pleading.

1740.
LAMBERT
against
STROOTHER.

In order to illustrate this a little more, I shall take notice that a plaintiff may reply three ways to such a plea of freehold, according as his case is;

1st, If his title be inconsistent with the defendant's plea, as that he insists that it is his freehold, or the freehold of another person, then he must traverse the defendant's plea; and as trespass is a possessory action, I think it is perfectly indifferent whether he sets forth his own title or not; and it was held that he need not in the case in 3 *Salkeld* before cited. If indeed the declaration be general, and the plaintiff upon the defendant's plea of liberum tenementum makes a new assignment of the whole trespass, he cannot traverse the defendant's plea of freehold, according to the case of *Prettyman v. Lawrence*, *Cro. Eliz.* 812; because the defendant ought to have an opportunity of answering to the new assignment, which is in the nature of a new declaration.

2dly, If he derives his title under the defendant, then to be sure he must not traverse the defendant's plea, but must admit the freehold to be in the defendant and insist on a lease or some other title under him, and then the traverse must come on the part of the defendant.

3dly, If the plaintiff has a middle case, and neither derives a title under the defendant, nor has a title inconsistent with his, he may plead as in the case of *King v. Coke*, *Cro. Car.* 384, where the defendant pleaded that the locus in quo was his freehold and the plaintiff replied that before the defendant had any thing in the premises the Marquis of *Winchester* was seised of them as his freehold and made a lease for years to a person under whom he claimed which was then subsisting, without either

1740.
 LAMBERT
 against
 STROOTHER.

confessing or denying the defendant's plea, and it was holden on a demurrer to be a good replication; for it was sufficient to maintain the plaintiff's action if true, even though the freehold were at that time in the defendant, and the plaintiff was not necessarily conusant in whom the freehold and reversion were. But that is not the case here. The present case is of the first sort; for here the plaintiff denies the defendant's plea, and has made no new assignment; neither could he, having ascertained the place in his declaration. Therefore for the reasons aforesaid, we are of opinion that the replication is good (a), and not liable to the objections in the demurrer or any other objections; so judgment on this demurrer, which is the only matter now before the Court, must be for the plaintiff (b)."

(a) The same point again occurred in the case of *Parry v. Wathen and Others*, Hil. 1747, 8, C. B., when it received a similar determination. There to trespass for breaking and entering the plaintiff's closes (naming them,) the defendants pleaded that the closes mentioned in the declaration were the closes soil and freehold of the defendant *Wathen*, and that he in his own right and the other defendants as his servants and by his command entered &c. The plaintiff replied that the said closes were the closes soil and freehold of him (the plaintiff) and not the soil and freehold of *Wathen* &c; concluding to the country. To this replication the defendants demurred specially, because it contained a traverse which it ought not to have contained; because the traverse and inducement to it were nought; and because

the replication ought to have concluded with an averment, and not to the country-- And after argument by *Belfield* Serjt. for the defendants and *Skinner* King's Serjt. for the plaintiff, the Court recognizing the case of *Lambert v. Stroother* gave judgment for the plaintiff. MS. *Willes* Ch. J.

(b) It was probably an incorrect note of this case that induced Mr. J. *Nares* to make the observation which he did in *Martin v. Kesterton*, 2 Bl. Rep. 1092, (where the defendant demurred to a declaration in trespass because the plaintiff had not named the closes in the declaration) namely, that in this case *Willes* Ch. J. held "that the plaintiff was not at liberty to declare generally, so as to make it necessary to plead the common bar, and reply it by a new assignment."

1740.

ROBERT BENNETT *against* ROBERT REEVE and Five Others.

M. 14 G. 2.
Thursday,
Nov. 27th.

THE following opinion of the Court was given by

Willes, Lord Chief Justice. " Replevin; For that the defendants on the 28th of *September* 1737 at the parish of *Mark* in the county of *Somerset* in a place called *Somer Leaze* took the cattle, viz. sixty-four sheep of *Robert Bennett* and detained them &c. Damage 40*l*.

The defendants justify the taking as bailiffs of *Richard Fownes* Esq. and say that the place called *Somer Leaze* where &c is and at the time when &c was a certain waste or great pasture containing by estimation one hundred acres of land lying and being at *Mark* aforesaid; and that the said *Richard Fownes* long before and at the time when &c was and still is seised in his demesne as of fee of and in the said waste or great pasture where &c, and because the said sixty-four sheep at the time when &c were in the said waste or great pasture depasturing on the grass there then growing and treading down the soil there and doing damage there to the said *Richard Fownes* they the said *Robert Reeve* &c as bailiffs to the said *Richard Fownes* well acknowledge the taking of the said sixty-four sheep in the place where &c, the said sheep so being in the said waste &c so depasturing &c; and this they are ready to verify; wherefore they pray judgment and a return of the sheep and their damages &c.

The plaintiff pleads in bar to the avowry, that long before the time when &c and at the time when &c one *Philip Biggs* was and yet is seised of one acre of land of *Old Auster* with the appurtenances lying and being in *Crickham* in the parish of *Wedmore* in the county aforesaid in his demesne as of fee, and that he the said *Philip Biggs* and all his ancestors and all those whose estate the said *Philip* had in the said acre of land time out of mind have had and used and been accustomed to have and use for himself and themselves his and their farmers tenants and undertenants of the said acre of land of *Old Auster* common of

Common
" append-
ant" only
belongs to
arable land.
—Levancy
and couchan-
cy are inci-
dent to com-
mon append-
ant as well
as to com-
mon appur-
tenant.

—Therefore
common ap-
pendant can
only be
claimed for
so many cat-
tle as are ne-
cessary to
plough and
manure the
tenant's ara-
ble land.

4 Vin. Abr.
583. pl. 6.
S. C.

1740.

BENNETT
against
REEVE.

of pasture in the said place called *Somer Leaze* wherein &c for all their commonable cattle every year and at all times of the year as appendant to the said acre; and the said *Philip Biggs* being so seised of the said acre long before the said time when &c to wit on the 4th of *November* 12 *W.* 3. by his deed of indenture sealed with his seal for the consideration therein mentioned did grant and devise all that the said acre of land to one *Evan Thomas* his executors administrators and assigns from thenceforth for and during and until the full end and term of ninety-nine years if *William Anne* and *Evan* sons and daughter of the said *Evan* (the father) or any or either of them should so long live, as in and by the said indenture &c; by virtue of which said grant the said *Evan* the father afterwards and before the said time when &c entered on the said acre and was possessed, and being so possessed afterwards and before the said time when &c by his deed of indenture sealed with his seal bearing date the 20th of *April* 1724 for the consideration therein mentioned did grant and demise unto *Robert Bennett* his executors &c one yard parcel of the said one acre of land of *Old Auster* for and during all the rest and residue of the said term of ninety-nine years &c as by the said indenture &c; by virtue of which said last grant and demise the said *Robert Bennett*, the father of the plaintiff, afterwards and before the time when &c entered into the said one yard parcel of the said one acre, and was possessed thereof and being so possessed afterwards and before the said time when &c made his last will and testament in writing viz. on the — day of — in the year —, and thereby constituted and appointed the plaintiff his son his sole executor, and afterwards and before the said time when &c to wit on the — day of — in the year last aforesaid died possessed of the said yard parcel of the said acre; after whose death the said *R. Bennett* the plaintiff, took upon himself the burden and execution of the said will, and before the time when &c entered into the said one yard parcel of the said acre of land and was and yet is possessed thereof; and the said *Robert*, the plaintiff, saith that the said *William Thomas* and *Evan Thomas* sons of the said *Evan* the father and each of them are now living; and that the said *Robert* the plaintiff being possessed of the said one yard parcel of the said acre of land to which the common of pasture aforesaid in *Somer Leaze* is appendant as aforesaid did before

before the taking of the said cattle to wit on the 28th of *September* 1737 put the said cattle, being the proper cattle of the said *Robert Bennett*, the plaintiff, into and upon the said place called *Somer Leaze* in which &c to use his said common there and feed and eat the grafs and herbage then and there growing, as it was lawful for him to do, and the said *Robert Reeve* and the other defendants afterwards on the said 28th of *September* 1737 in the said place in which &c took the said cattle of the said *Robert Bennett* the plaintiff viz. the said sixty-four sheep then and there feeding and using the said common and then unjustly detained &c; and this he is ready to verify, wherefore he prays judgment and his damages &c; and brings into court the letters testamentary &c.

1740.
BENNETT
against
REEVE.

The defendants reply; and protesting that the said *Philip Biggs* &c had no such right of common as is set forth in the plea as appendant to the said acre, they say that the said sheep in the declaration mentioned at or before the time of putting the same into the said place called *Somer Leaze* in which &c were not nor was any or either of them levant and couchant in and upon the said one yard land parcel &c; and this they are ready to verify, and pray judgment and a return &c as before.

The plaintiff demurs to this replication, and shews for cause that the plea aforesaid pleaded by way of reply, and the matter therein contained, is not issuable, nor doth it confess avoid or deny the plaintiff's plea above pleaded &c.

The defendants join in demurrer.

The case comes before the Court (a) on this demurrer of the plaintiff to the defendants' replication.

And the single question is whether levancy and couchancy is incident to common appendant as it is admitted to be to common appurtenant; for if it be incident to common appendant,

(a) It appears that this case was twice argued; the first time on the 22d of *November* 1739 by *Gapper* Serjt. for the plaintiff, and *Draper* Serjt. for the defendants; the second time by *Wynne* Serjt. for the former and *Burnett King's* Serjt. for the latter on the 10th of *May* 1740.

1740.
BENNETT
against
REEVE.

then the replication puts a material matter in issue, and consequently the demurrer is not good. Besides, if this be so, judgment must be for the defendants for another reason, because the plaintiff has confessed by his demurrer that the sheep were not levant and couchant on the premises.

Whether this levancy and couchancy ought to have been pleaded by the plaintiff or not we need not determine at present, because this point may perhaps be a little more doubtful; and as it is insisted on by the replication, if it be material, for the reasons I have before mentioned, that is sufficient to over-rule the demurrer.

Several other little objections were likewise taken to the plaintiff's plea in bar, which I shall take no notice of, because they seemed to be of no great weight.

But the single question that we shall consider is whether in the case of common appendant, as well as common appurtenant, the cattle ought to be levant and couchant; and this could never have admitted of a doubt if the nature of common appendant had been thoroughly considered and well understood. But the doubt arose only from a mistake of the nature and original of common appendant. For it was said by the counsel for the plaintiffs, and some books were cited for that purpose, that the tenants of arable land were obliged to plough the land of their lords, and that, as by their tenure they must keep cattle for that purpose, it was therefore incident to their estates that they should have common for such cattle in the wastes of their lords.

But this notion is neither founded in law or reason, and when it comes to be considered is attended with great absurdities. It is true indeed that common appendant only belongs to arable land, as is expressly said in *Co. Lit.* 122. a. &c (a), and it is so necessarily incident to it that it cannot be severed. And therefore if the land be divided never so often, every little parcel is entitled to common appendant, (as it is claimed in the pre-

(a) See also 26 Hen. 8. 4. a. pl. 15.

sent case only for a yard of land.) And this shews the absurdity of the notion that I before mentioned, because if that were so, every man who has a yard of land to which common appendant belongs would be obliged to keep a team of horses or oxen to plough his lord's land and would have a right of common for them in the lord's waste. But that this is not the reason of common appendant appears also from this, that a man may have common appendant for heifers and sheep, which are of no use in ploughing, but are of great use in manuring the land. And so it is expressly held in 1 *Rol. Abr.* 397. and seemed to be admitted by the counsel for the plaintiff; and it was necessary for them so to do, the common claimed by the plaintiff in the present case being for sheep.

1740.
BENNETT
against
REEVE.

The reason therefore for common appendant appears to be this, that as the tenant would necessarily have occasion for cattle not only to plough but likewise to manure his own land, he must have some place to keep such cattle in whilst the corn is growing on his own arable land, and therefore of common right (if the lord had any waste) he might put his cattle there when they could not go on his own arable land. This is a sensible and intelligible reason for this custom, and is said to be the reason in *Co. Lit.* 122. a. And this being admitted to be so, it puts an end to the present question. For from hence it is plain that the tenant can only have a right of common for such cattle as are levant and couchant on his estate, that is, for such (a) and so many as he has occasion for to plough and manure his land in proportion to the quantity thereof. And if he has a right of common for no more, no absurdity will follow, let the land be divided never so often and into never such small parcels: whereas in the present case it is absurd and unjust on the face of it that a person, who has but one yard of land, should have a right of common for sixty-four sheep.

This being the nature of common appendant, it is plain that a man cannot have a right of common appendant for any cattle but such as are wanted either to plough or manure his land. And it is as plain likewise that he cannot for cattle which he

(a) And therefore a plea, claiming common appendant for all kinds of beasts, cannot be supported. 37 *Hen.* 6. 34.

borrow,

1740.
BENNETT
against
REEVE.

borrows, unless he make use of them all the year to plough or manure his land.

Having thus shewn the nature of common appendant, the present case is (I think) so very plain that I need hardly mention any authorities to support it.

But as some persons are of opinion that if a case be never so plain it ought to be supported by authorities, I shall take notice that this is expressly said to be law in *Tyrringham's case*, 4 Co. 36. b., and that common appendant is only for such cattle as are levant and couchant on the land; and the reasons there given for it are much the same as I have already laid down, and therefore I shall not repeat them. The same is likewise held in 1 *Rol. Abr.* 398; and there are several cases out of the Year Books cited there for that purpose. There were likewise several other cases cited on the part of the defendants out of *Cro. Jac.*, *Palmer*, *Levintz*, *Ventris* &c: but I forbear to mention them, because on looking into them they are all so very obscurely reported that it is not possible to say whether the common there in question were common appendant or appurtenant, which are frequently confounded in the books; and therefore I do not at all rely on the authority of those cases, nor does the present case want it.

There are indeed some cases in the old books, and some of them were cited on the part of the plaintiff, which speak of common sans nombre, and which seem to imply that levancy and couchancy is only necessary in the case of common appurtenant, and not in the case of common appendant. But the notion of common sans nombre, in the latitude in which it was formerly understood, has been long since exploded, and it can have no rational meaning but in contradistinction to stinted common where a man has a right only to put in such a particular number of cattle.

But to say that a man who has but one yard of land, as in the present case, shall have a liberty of common right (as common appendant is) of putting in as many cattle as he pleases upon his lord's waste, though consisting of many thousand acres,

without any regard to the levancy and couchancy, is so very wild a notion that I wonder it could ever be entertained by any one who thought twice. The writ of admeasurement and the right of approvement by the lord both likewise plainly shew that there is nothing in this notion. For how can that be admeasured which hath no bounds? Or how can the lord, when he approves, leave sufficient common for his tenants, if they have a right to put in as many cattle as they please?

I shall say no more in a case that I take to be so very plain, but that we are all of opinion that the plaintiff's demurrer must be over-ruled, and that judgment must be given for the defendants."

WELLES an Attorney *against* TRAHERN and ETTY.Friday,
Nov. 28th.

THIS was an action of assault and battery and false imprisonment, laid in *Middlesex*, by an attachment of privilege; to which the defendants pleaded a joint plea of justification, in which it was alleged that *Trabern* was one of the proctors of the University of *Oxford*, and that *Etty* was keeper of the gaol there; that the plaintiff was committing disorders in the night-time within the precincts of the University, wherefore *Trabern* as proctor apprehended him and committed him to the custody of the other defendant, as he lawfully might by the charters granted to the University and by the laws and statutes of the same; traversing being guilty of the said trespass &c at *Westminster* or elsewhere out of the precincts of the University.

The plaintiff admitted the privileges of the University and that *Trabern* was proctor &c, but replied that the defendants of their own wrong and without the residue of the cause by them alleged in their plea assaulted and imprisoned him &c.

Before a rejoinder was put in, the Chancellor &c. of the University claimed consuance of the cause (a); after their claim had

(a) The claim was entered in the following manner (1);

"Michaelmas term in the 13th year of King George the Second. Know all men by

(1) If the claim be not so made, it cannot be allowed. *Leasingby v. Smith*, 2 *Wils.* 406.

1740.

BENNETT
against
REEVE.

When either of the Universities claims consuance of a cause, it must be claimed before imparlance. —When an attorney is plaintiff, whether the University is entitled to consuance of the cause?

2s.

Barnes 346.
Pract. Reg.
696. and
5 Vin. Abr.
590. S. C.

1740.
WELLES
against
TRAHERN.

had been argued at the bar, the Court took time to consider of it, and on this day the judgment of the Court was given as follows by

Willes

by these presents that we *Charles* Earl of *Arran* Chancellor of the University of *Oxford* have made and appointed and in our place put and by these presents do make appoint and in our place put *Henry Wilmot* and *Nicholas Cotterell* Gentlemen and either of them our true and lawful attornies jointly and severally for us and in our name and stead to demand ask claim and defend all and singular the liberties and privileges of the said University, and especially to claim and demand to have as well the conuſance of a certain action of trespass depending in his Majesty's Court of Common Pleas at *Westminster* between *Paul Welles* Gentleman one of the attornies of the said Court plaintiff and *Edward Trahern* clerk and *Charles Etty* defendants, which said defendants are privileged persons of the said University, as of all and singular pleas plaints and causes whatsoever (maihem felony and freehold only except) where a scholar or other privileged person of the said University is one of the parties in the Court of the University aforesaid to be held before us the said Chancellor or commissary or deputy for the time being, and also to claim demand and defend all and all manner of liberties and privileges of the University aforesaid for any person whomsoever rightly and lawfully privileged; dated under the seal of the office of Chancellor of the University of *Oxford* the 28th day of *June* in the 13th year of the reign of our Sovereign Lord *George* the Second by the Grace of God of *Great Britain France* and *Ireland* King defender of the Faith &c, and in the year of our Lord 1739.

Elsewhere as it appears of last *Trinity* term upon the Roll it is thus contained, *Middlesex* to wit *Edward Trahern* clerk and *Charles Etty* were attached &c (here followed the declaration, plea, and replication.)

And thereupon cometh *Charles* Earl of *Arran* Chancellor of the University of *Oxford* by *Henry Wilmot* his attorney

above named to ask and claim prosecute and defend all and singular the liberties and privileges of him the said Chancellor, and thereupon he prays his liberty, that is to say, to have the conuſance of the plea aforesaid before him the said Chancellor his commissary or his deputy to be held at *Oxford*, because he saith that the Lord *Henry* the 8th late King of *England* by his letters patent in due form of law made and under his great seal of *England* sealed bearing date at *Westminster* the 1st day of *April* in the 14th year of his reign granted to the then Chancellor and scholars of the said University of *Oxford* and to their successors (amongst other things) that the said Chancellor his commissary or his deputy and their successors or the steward under-steward and other Judges of the said Chancellor and his successors deputed by their letters sealed under the seal of his office should hear and determine as well all manner of trespasses and other offences whatsoever as also of misprisions extortions conspiracies confederacies maintenances false allegations accounts contracts and injuries whatsoever, and all other articles which might fall in fine or ransom or in other pecuniary punishment, and of all other contracts pleas and complaints personal and other causes and matters whatsoever under whatsoever name they are or may be comprised, although they should concern the said late King himself his heirs or successors (assizes and pleas of freehold only excepted) after what manner soever arising done or committed or to be done or committed within the town of *Oxford* the suburbs hundred or county of *Oxford* aforesaid or elsewhere within the kingdom of *England*, as well at the suit of our Lord the said late King his heirs or successors as at the suit of the party or otherwise howsoever, where the scholars or their servants or ministers or any other persons who ought to have any privilege of the said University whom the said Chancellor commissary or his deputy or their

Willes Lord Chief Justice. "There are two points in this case;
1st, Whether the University of *Oxford* have claimed the conu-
sance

1740.
WELLES
against
TRAHERN.

their successors should challenge was or should be one of the parties, and that they should or might inquire by scholars or their servants or by the laity of the said town of *Oxford* or by others, and should have full conuance and correction thereof, and such pleas complaints causes and matters in whatsoever place soever within the town of *Oxford* or the suburbs thereof or the precincts of the said University as they should think fit, and execution thereof according to their statutes and customs or according to the law of *England* at the will of the said Chancellor commissary or his deputy and their successors should do and make, and should hear and determine all and singular the said articles causes matters and complaints (except as before excepted,) and should have levy and perceive all and all manner of amerciaments issues forfeitures and profits coming therefrom to the use and benefit of the said University by themselves and their deputies for ever; so that no justice assigned to hold pleas before the said King or his heirs or justice of the Common Bench justice of assize justice of gaol delivery or keeper of the peace or justice of servants labourers and artificers or other justice or judge whatsoever steward or marshal or clerk of the market of the household of the said late King *Henry* the 8th or his heirs sheriff mayor bailiff or other officer or minister of the said late King or his heirs whatsoever should in any sort intermeddle concerning such pleas quarrels contracts articles causes matters or other things aforesaid or concerning any of them (except as before excepted) done or to be done in the said town of *Oxford* the suburbs or precincts thereof or elsewhere within the kingdom of *England*, neither in the presence nor absence of the said late King or his heirs; and if the same justices or other ministers of the said late King or any of them in the presence or absence of the said late King or his heirs should for the future presume to

inquire intermeddle or take any conuance of upon or concerning any of the premises (except as before excepted), the same justices and other ministers and officers aforesaid on the certificate notification or signification of the Chancellor of the University aforesaid who should be for the time being or commissary or his deputy should supersede such inquisition and conuance or process and all executions to be had thereon whatsoever, and should not thereof any further in any sort intermeddle nor put the party to answer thereupon before them, but that the party aforesaid only before the Chancellor and his successors their commissary or deputy thereof should be chastised and punished in form aforesaid, as by the same letters patent more fully appeareth. And the said Chancellor further saith that by a certain act in the Parliament of the Lady *Elizabeth* late Queen of *England* begun and holden at *Westminster* in the county of *Middlesex* on the 2d day of *April* in the 13th year of her reign (amongst other things) it was enacted by the authority of the said Parliament that the said letters patent of the said late King *Henry* the 8th the most noble father of the said Queen's highness made and granted to the said Chancellor and scholars of the said University of *Oxford*, bearing date on the said 1st day of *April* in the said 14th year of the reign of the said late King, and also all other letters patent by any of the progenitors or predecessors of the said Lady the Queen made to the body corporate of the said University of *Oxford* or to any of their predecessors of the said University by whatsoever name or names the Chancellor masters and scholars of the same University in any of the said letters patent have been before that time named, should from thenceforth be good effectual and available in the law to all intents constructions and purposes to the then Chancellor master and scholars of the said University and their successors for evermore after and according to the form words sentences and true meaning of every of the said letters patent

1740.

WELLES
against
TRAHERN.

sance in time; 2dly, If they had claimed it in time, whether they are entitled to it in the present case.

The

patent as amply fully and largely as if the same letters patent had been recited verbatim in the then present act of Parliament, any thing to the contrary in any wise notwithstanding; And further it was enacted by the authority aforesaid that the said letters patent of the said Queen's highness's late father King Henry the 8th, bearing date as is before expressed, made and granted to the said corporate body of the said University of Oxford and all other letters patents by any of the progenitors or predecessors of the said Queen's highness and all liberties franchises immunities quietances and privileges lets law-days and other things whatsoever therein expressed given or granted to the said Chancellor masters and scholars of the said University or to any of the predecessors by whatsoever name the said Chancellor masters and scholars of the said University in any of the said letters patents were named by virtue of the then present act were from thenceforth ratified established and confirmed unto the Chancellor masters and scholars of the Universities aforesaid and to their successors for ever, any statute law usage custom construction or any other thing to the contrary in any wise notwithstanding; as by the same act (amongst other things) more fully appeareth. And the said Chancellor further saith that the said Edward Trahern and Charles Etty on the day of the issuing out of the original writ of the said Paul and at the time when the causes of action of the said Paul accrued and before that time and continually since hitherto were and are and each of them is privileged persons of the said University, that is to say, the said Edward Trahern was and is a master of arts and fellow of Brazen-Nose College in the said University, and one of the proctors of the said University dwelling and residing within the said University and therein matriculated, and the said Charles Etty was and is a minister or servant of the Chancellor masters and scholars of the said

University, to wit, keeper of the gaol in the said University within the jurisdiction thereof; and that the causes of action specified in the said declaration of the said Paul arose and accrued within the liberties of the said University, that is to say, at Oxford aforesaid; and that the said Edward Trahern and Charles Etty were and yet are subject and ought to be summoned and impleaded for the said causes and matters in the said declaration specified before the Chancellor of the University aforesaid his commissary or his deputy and not elsewhere nor in any other Court whatsoever. And the said Chancellor saith that he the said Chancellor his commissary or his deputy of the University of Oxford aforesaid and all his predecessors Chancellors of the said University for the time being their commissaries or deputies ever since the making of the letters patents aforesaid always hitherto have had the conuſance of all pleas aforesaid (except as before excepted) concerning or touching in any manner any master or scholar of the University aforesaid for the time being or their servants or any common minister of the University aforesaid or any privileged person of the said University; and this the said Chancellor is ready to verify; wherefore the said Chancellor prays the liberty aforesaid and conuſance of the said plea in the said court of our Lord the King of the Bench here; to wit, at Westminster now between the said parties depending by virtue of the letters patent aforesaid and by force of the said statute to be allowed to him &c. And the said Chancellor further saith that formerly to wit of the term of Easter in the 9th year of the reign of her late Majesty Queen Ann the then Chancellor of the said University in the court of the said Queen before the Queen herself at Westminster in a certain plea of trespass upon the case then depending between William Riley and William Appleby plaintiffs and John Stonell defendant claimed his said liberties and privileges and conuſance

The counsel spoke only to the first point, because if the Court should be of opinion that it was not claimed in time, there was no occasion for entering into the other point; and we are all of opinion that it was not claimed in time. And in this we are confirmed not only by the reason of the case but by several cases in which this point has been so determined.

1740.
WELLES
against
TRAHERN.

The time that has been laid down in several cases is that the University must come before imparlance: whereas in the present case they were so far from coming before imparlance that they did not come until after a replication and issue tendered. And though it was said that the University might often lose this privilege if they were obliged to come before imparlance or plea pleaded, we think the injustice and inconvenience would be much greater on the other side. For if they were not confined to the time of imparlance or of plea pleaded, they might as well come at any time before judgment, which would occasion great delay of justice and great expence to the parties. Besides, it is certain that the University do not judge according to the common law but according to the civil law; so that if this conu-
fance be allowed men's properties are to be tried without a jury

conu-
fance of the said plea by virtue of the letters patent of the said King *Henry* the 8th, and by virtue of the statute aforesaid to be allowed to him &c; whereupon all and singular the said premises being inspected and fully understood by the said Court of the said late Queen it was considered that the conu-
fance of the said plea between the said *William Riley* and *William Appleby* plaintiffs and the said *John Stonell* in the said court depending should be allowed to the Chancellor of the said University of *Oxford* &c; as by the record thereof remaining inrolled in the said court of the said late Queen of the said term of *Easter* in the said 9th year of the said late Queen aforesaid upon the 330th roll more fully appears. And the said Chancellor prays that the said record of the said *Easter* term may be seen and inspected, and that his said liberty and conu-
fance of the said plea in the said court here

depending by virtue of the letters patent aforesaid and by force of the said statute and the allowance aforesaid may be allowed to him &c; with this that the said Chancellor doth aver that the said *Edward Trahern* and *Charles Etty* mentioned in the said declaration and the said *Edward Trahern* and *Charles Etty* mentioned in the said warrant of attorney and claim above specified are the same persons and not other or different persons. And the said Chancellor brings here into court the said letters patent of the said late King *Henry* the 8th under his great seal dated the 1st day of *April* in the 14th year of his reign; and also the said Chancellor brings here into court the exemplification of the said act of Parliament under the great seal of the said Lady *Elizabeth* Queen of *Great-Britain*, dated at *Westminster* the 7th day of *June* in the 13th year of her reign."

1740.
 WELLES
 against
 TRAHERN.

and by a different law from the law of the land. If an act of Parliament will grant such a jurisdiction, we cannot help it: but whenever it is granted, we ought to take care that it is kept within its legal bounds and claimed in proper time. For we are of opinion that such a jurisdiction being contrary to the law of the land cannot be granted without an act of Parliament (a), even by the King himself; no more than he can erect a new Court of Equity by letters patent which it has always been held that he cannot: and so it was expressly said in the case of *Pern v. Manners* (b) in the *King's Bench*, which I shall mention by and by.

If this were a new point, I should think myself obliged to consider all the cases that were cited on the one side and the other, and to shew how far they are applicable to the present. But I need not do it now, because this matter has been already so solemnly settled and determined in the court of *King's Bench* in the case of *Pern v. Manners* H. 11 An. upon a claim of the University of *Cambridge*, whose claim as appears by a copy of their charter which has been laid before me is in as extensive words as, if not more extensive in respect to the exclusion of all other jurisdictions than, the words in the charter of the University of *Oxford*; so that that case is a case in point. And in that case it was adjudged by the whole Court, after a long argument in which almost all the cases that have been now cited were mentioned and after great deliberation, that the University of *Cambridge* who then claimed their consueance within five days after the imparlance and before any plea pleaded came too late, for that they ought to have come the first day that there might be no delay of justice, and because the consueance there claimed (and it is the same in the present case) would oust the party of the benefit of the common law and of a trial by jury; and they relied on several cases in the Year Books, particularly the 6 Hen. 7, 9, b. and 16 H. 7. fo. 16. a. (c). This case was afterwards cited and allowed to be good law in the case of *Baker v. War-*

(a) Vid. *Hardr.* 509.

(b) This case has been since reported in *Fort. Rep.* 155; and is also to be found in 5 *Vin. Abr.* 588, pl. 21; and 589, pl. 22.

(c) See also the Bishop of *Ely's* case, 1 *Sid.* 103; *Parker v. Edwards*, 1 *Show.* 352; *Leasingby v. Smith*, 2 *Willf.* 310; and *R. v. Agar*, 5 *Burr.* 2820.

ren. (a) in *B. R. Tr. 12 Geo. 1.* And the same was likewise solemnly determined in that court, in respect to the University of *Oxford*, upon the foundation of the case of *Pern v. Manners* in the case of *Wood v. Graham, Tr. 1 Geo. 2.*, as we were informed by a gentleman who argued in the present case, and who I am sure would not impose upon us, though I own I cannot get a particular report of that case.

This matter therefore having been already so solemnly determined, I shall only take notice of a case or two which I believe were not cited in the argument of *Pern v. Manners*, and of one that was subsequent to that case.

The first case that I shall mention is the case of ancient demesne, *Latch 83, 84*, the case of *Marshall v. Allen*, where it was holden that a man may plead ancient demesne after an imparlance: but it is said there that that is the only case where it is so, and that stands upon a very different reason from the present; for in the case of ancient demesne a man may not only plead it after imparlance, but a tenant in ancient demesne may even reverse a fine when completed or a final judgment given against him in a real action by writ of disceit; and the reason is because so long as the fine or the judgment remains unreversed the privilege is entirely gone, and the lands are for ever thereafter pleadable at common law, which would be very hard. But in the present case, though the University should come too late now, they would only lose the conusance of the present cause, and may exercise their jurisdiction in all causes hereafter in as extensive a manner as before.

There has been a case likewise laid before me (b), which was not cited: but this is a strange case, and must certainly be the effect of power rather than of judgment; for it was even before

(a) In that case the conusance was allowed, because it was claimed before imparlance: but the Court said "If there had been an imparlance, it could not have been allowed, as in the case of *Pern v. Manners*, which was remembered and agreed to be good law." MS. Coll. *Willes* Ch. J.

(b) In the original manuscript of this judgment there is a reference by the Chief Justice to this case being written on a separate paper: but it is not now to be found among his papers; it appears however from 5 *Vin. Abr.* 591, that this was a case in *Hil. 12 Edw. 3*, in the court of Exchequer.

1740.

WELLES
against
TRAHERN.

the charter of *Hen. 8.* and the stat. 13 *Eliz*; when there was no pretence that the University had a right to such an exclusive jurisdiction; and therefore I lay no weight upon it.

The only other case that I shall mention is that of *Aldrich v. Dr. Stratford* (a), which was in the *Trinity* term after the case of *Pern v. Manners*, and there the Lord *Harcourt* allowed the jurisdiction of the University of *Oxford*; and I shall only just mention it, because I gave you the full history of it and my opinion upon it at large when it was cited by the counsel for the University. And for the sake of Lord *Harcourt*, who was as great a Judge as ever sat in *Westminster-Hall*, and made as few mistakes as any one, I will not repeat what I then said. I shall only say thus much of it at present, as it was a judgment given by him without any reasons and directly contrary to the strongest reasons that he himself had laid down but about a week before in the same case, it is a case that has no weight with me; for I will not be influenced by any judgment that is founded either on fear or favor.

Having said thus much on the only point that now comes before the Court, it is not necessary to say any thing on the other point; because, as our opinion is that the University have not claimed this conusance in time, it is not material whether they were entitled to it or not in the present case. But give me leave to say thus much upon it, that there are cases in which it has been adjudged that where an attorney is plaintiff the privilege of the University cannot take place (b); because the privilege of attornies suing in their respective courts is by reason of their necessary attendance there for the sake of justice and the benefit of all the people of *England*; and as they have been entitled to this privilege time out of mind, no charter of the King can take it away from them, nor even an act of Parliament, unless they are therein mentioned by express words. And so it is expressly determined in a case in *Lit. Rep.* 304., which is in respect to the University of *Oxford* and an attorney of this court; and is founded on *Butt's* case 1 *Roll. Abr.* 489, and Lord *Anderson's*

(a) 22 *Vin. Abr.* 11. pl. 13.

(b) And the claim can only be made

| in respect of resident members. *Hayes v. Long, Clerk*, 2 *Will.* 310.

case 3 *Leon.* 149., which cases do not relate to the Universities (a), but to other jurisdictions; but the same doctrine is there laid down.

1740.
WELLES
against
TRAHERN.

I need not give my opinion of these cases, nor say how far I agree with them till the matter comes judicially before us. But whenever it does, though I shall be as tender of the privileges of the University of *Oxford* as any man living, having the greatest veneration for that learned body, yet I hope I shall always as far as I can by law endeavour to support the common law of the land and that excellent method of trial by juries, upon which all our lives liberties and properties depend; and that I shall endeavour as far as I can to prevent the encroachment of any jurisdiction whatever that proceeds by another law and another method of trial.

But at present I need only say that we are all of opinion that this consuance is not claimed in time, and that therefore it must be disallowed."

(a) That in *Littleton* was a case relating to the University of *Oxford*, in which the plaintiff, an attorney of the court of Common Pleas, sued the defendant a member of the University, and the claim of consuance was denied.

JOHN HUGGINS *against* THOMAS BAMBRIDGE.

H. 14 Geo. 2.
Friday,
Feb. 6th.

THE opinion of the Court was thus delivered by

Willes, Lord Chief Justice. "Debt on a bond, dated 28th of September 1728 in the penalty of 5000*l.* Damage 10*l.*

The defendant prays oyer of the bond and condition, which was for the payment of 2500*l.* on the 29th of September 1730 with lawful interest for the same; and then pleads letters patent 22d July 12 *Anne*, whereby the Queen grants the office of

A contract with the warden of the Fleet (who held only for life under the crown) that for a sum of money he should surrender the office to the King, to the intent that he should pro-

cure from the King a grant of the office to the purchaser, is void by stat. 5 and 6 Ed. 6. c. 16; though that office has been, and may be, granted to a subject in fee;—and a bond given to secure the payment of such consideration-money cannot be enforced in a court of law.

—It is not sufficient in a plea to an action on such a bond to state generally that the case is within the statute: the defendant must set forth in his plea facts to shew that the case is within the statute.

—The exception in the stat. 5 and 6 Ed. 6. c. 16. that the act shall not extend to any office of which any person is seised of any estate of inheritance, means only offices of which *subjects* are seised of estates of inheritance.

1740, 1.

HUGGINS
 against
 BAMBURGH
 BRIDGE.

warden or keeper of the Fleet, and the custody of the prison and gaol of the Fleet therein more particularly described, and several messuages and lands thereunto belonging, and all its profits appurtenances &c, to the plaintiff for life, to be executed by him or his sufficient deputy or deputies; and that by the same letters patent Queen Anne granted the same office &c to *John Huggins*, son of the plaintiff, to hold to him for life in the same manner after the death surrender or other determination of the estate and interest of the plaintiff therein. That by virtue of the said letters patent the plaintiff was seised of the said office &c as of fee and freehold for the term of his life, the reversion belonging to his said son for his life. And the defendant avers that the said office time out of mind hath touched and concerned and still doth touch and concern the execution of justice; and goes on and pleads that on the 2d of *August* 2 G. 2. it was corruptly and contrary to the form of the statute in that case made and provided bargained and agreed by and between the now plaintiff and the defendant and *Dougall Cutbbert Esq.* that the plaintiff being seised of the said office and premises, the reversion belonging to his son as aforesaid, and the said office being an office which then touched and concerned and still doth touch and concern the execution of justice as aforesaid, the plaintiff and *John* his son should surrender and yield up into the hands of the King the said several offices and premises &c, and all their estate and interest therein together with the said letters patent to be cancelled, "for the intent and purpose that the plaintiff should procure a grant of the said office from the King to the defendant during his life, and also a grant thereof from the King to *Dougall* (for his life) from the determination of the estate so to be granted to the defendant, and that the defendant in consideration thereof should pay to the plaintiff 2500*l.* on the 29th of *September* 1730 with lawful interest for the same from the 28th of *September* 1728, and for securing payment thereof should by his writing obligatory to be sealed with his seal and to bear date the 28th of *September* 1728 acknowledge himself to be bound to the plaintiff in 5000*l.*, with condition for the payment of 2500*l.*, with such interest as aforesaid, and that the said *Dougall* should pay to the plaintiff the further sum of 2500*l.*"

The

The defendant further pleads that in performance of the said corrupt bargain and agreement the plaintiff and his son on the 14th of *August* 2 *Geo.* 2. by deed under their seals inrolled on the 15th, reciting the said letters patent, did and each of them did surrender and yield up the said office &c and the said letters patent to be cancelled, which said surrender the King did then accept; and that the defendant in performance of the said corrupt agreement, and after the said surrender &c, did by the said deed now brought into court become bound to the plaintiff in manner and form as by the said writing brought into court is alleged with the condition thereunder written. The defendant further pleads that his present Majesty afterwards, viz. on the 30th of *September* 2 *Geo.* 2. by his letters patent under his great seal, bearing date on that day, for himself his heirs and successors gave and granted to the defendant the said office &c (describing them as before) with all the fees profits &c thereunto belonging, to hold the same to the defendant for his life, to be executed by him or his sufficient deputy or deputies, in as ample a manner as the plaintiff or any former warden held and enjoyed the same; and that by the same letters patent the office is in the same manner granted to *Dougall Cuthbert* for life after the death or other determination of the estate and interest of the defendant therein, which letters patent pursuant to a proviso therein were afterwards in the *Michaelmas* term following inrolled in this court. And the defendant avers that the said grant of the said offices and other the premises by the said letters patent made to the defendant and *Dougall* was made to them as aforesaid by the procurement of the plaintiff and according to the said corrupt bargain and agreement; whereupon he saith that the said writing in the declaration mentioned brought into court made as aforesaid and for the cause aforesaid is contrary to the form of the statute, and void in law; and this he is ready to verify &c; and avers that the said office concerns the execution of justice, and that the office granted by the letters patent and the office concerning which the agreement was made with the plaintiff are the same office &c; and so prays judgment.

The plaintiff demurs generally, and the defendant joins in demurrer.

This

1740, I.
HUGGINS
against
BAM-
BRIDGE.

1740, 1.

HUGGINS
against
BAM-
BRIDGE.

This is a case upon the statute 5 & 6 *Ed. 6. c. 16.* On the argument (a) of this cause two things were insisted on by the plaintiff to shew that the defendant's plea was not good;

1st, That this is not an office within the statute, being one of those that are excepted out of it.

2dly, That if it were an office within the statute, yet that the defendant hath not set forth enough in his plea to bring his case within the statute.

It was admitted that this is an office which concerns the execution of justice, and that therefore it is within the general words of the statute 5 & 6 *Ed. 6. c. 16.* against buying and selling offices, on which statute this question arises. Nor could this be denied in the argument, because it is several times averred in the plea to be so, and consequently is confessed by the general demurrer. But what was relied on by the plaintiff, as to this first point, is an exception in the act, which is in these words; sect. 4. "Provided always that this act or any thing herein contained shall not in anywise extend to any office or offices, whereof any person or persons is or shall be seised of any estate of inheritance." And it was insisted that this is an office of inheritance in the crown; and that though it is granted only to the defendant for life, yet that the King may grant it in fee; that it hath been several times so granted; and that therefore it is within the exception.

To make out this fact that it is an office of inheritance, and that it hath been granted by the King in fee, were cited the statute 8 & 9 *W. 3. c. 27. s. 10 & 11*; 3 *Lev. 288*, and some other books; and to be sure this cannot be denied. And this must be the meaning (if there be any meaning) of what is said obiter in the case of *Blankard v. Galdy*, reported in 4 *Mod. 215* &c, that no gaoler is excepted out of this statute but the marshal of the King's Bench and the warden of the Fleet, the inheritance of which offices was (I suppose) at that time, or at least taken to be, granted to a subject, otherwise there was no colour

(a) This case was argued in the *Easter* | plaintiff and *Agar* Serjt. for the defend-
term preceding by *Bootle* Serjt. for the | ant, and a second time in the next term.

to say that they were excepted out of the statute of *Edward the Sixth*. That this office may be granted by the King in fee I admit: but the question is whether, it being now granted only for life, it is within the exception of the statute. To prove that it is was cited for the plaintiff the case of *Ellis v. Ruddle*, which is reported three or four times; first in 2 *Lev.* 151. by that name; three times in 3 *Keble*, by the name of *Ellis v. Audle*, p. 552, and by the name of *Ellis v. Nulfo*, p. 659, and 678. And this case was strongly relied on (and I think it was the only one that was cited for this purpose) as an authority in point for the plaintiff. But this case is so imperfectly reported that it is difficult to know what to make of it. But, if taken to be as reported by *Levintz*, it is so absurd an opinion that I can lay no weight at all on it. The question was concerning a demise for years of the bailiwick of the *Savoy*, and it was there said that the inheritance being in the King, though the question was only concerning a lease for years, it was a case within the exception of the statute: but this not appearing on the plea, the parties were ordered to replead that it might appear on the record that the inheritance was in the crown: that is all that is reported in that book; and I own if I had no further light into the case, it is an authority in point for the plaintiff. But Mr. *Keble*, in his first report of it, though he seldom enlightens any thing, yet has let me into the knowledge of a matter which might possibly be the foundation of the opinion of the Court, or if not I cannot conjecture on what they went; for he says that the bailiwick of the *Savoy* was in the King as Duke of *Lancaster*, and if so it probably was considered on the same foot as if the office were the inheritance of a subject; and in p. 659., where he has reported the opinion of the Court for the plaintiff after a repleader, he says that the office was held not to be within the statute, because the franchise itself was in fee in the King, as parcel of the Duchy of *Lancaster*. He has reported the case again p. 678., but there it is so unintelligibly reported that it is impossible to make any thing of it. If therefore the Court, as it seems that they did by *Keble*, went on this distinction that the office being in the King as Duke of *Lancaster* it must be considered on the same foot as if the inheritance were in a subject, there may be some foundation for the opinion of the Court:

3 R

but

1740, 1.

HUGGINS
against
BAM-
BRIDGE.

1740, I.

HUGGINS
against
BAM-
BRIDGE.

but if so, then it is no authority at all in the present case. If the Court did not go upon this, I cannot help saying that it is the most absurd opinion that ever was given, and without departing from common sense I can have no regard to it. For first such a construction would almost overturn the whole act, and this is certainly *maledicta constructio*. For as to most of the offices there particularly enumerated, as the auditorship and surveyorship of the King's honors and castles, and many others, the inheritance is undoubtedly in the King; and it is very difficult to say to what offices it extends, if this construction were to take place; to many offices which greatly concern the administration and execution of justice I am sure it would not. Besides this construction is contrary to common sense and the known rules of all exceptions; for no one can be excepted out of a statute that is not within the general words of the statute. Now, according to this construction, the King, if the inheritance be in him, is a person mentioned in the exception. But that cannot be; because to be sure there is no forfeiture upon the crown; for the King is not within any statute unless particularly named, nor can he forfeit any thing, nor can he be supposed to be guilty of any corruption or misbehaviour. This exception therefore only means where the inheritance is in a subject. I shall therefore say no more upon this, the construction insisted on being so contrary to the plain intent of the statute, and there being only this imperfect case to support it.

In the case of Sir *A. Ingram* stated in *Co. Lit.* 234. a., and cited in *Cro. Jac.* 386, and in *Hob.* 75, as an undoubted authority, this notion was never thought of. That was the case of the cofferer of the King's house, of which Sir *Robert Vernon* was possessed by grant from the crown, who agreed with Sir *A. Ingram* for a sum of money to surrender his office to the King to the intent that the King might grant it to Sir *A. Ingram*, which was done accordingly. The case was referred to the Chancellor and several of the justices, who unanimously determined that that case was within the statute of *Edward the Sixth*; and Sir *A. Ingram* lost his office, and they held (as my Lord *Coke* says) that all promises bonds and assurances given for these purposes were made void by the act. And this is a case very like

like the present, as I shall take notice by and by, only the present is a little stronger; here being not only an intent but a procurement expressly alleged and confessed.

1740, I.

HUGGINS

against

BAM-

BRIDGE.

As to the second point, that there is not sufficient matter set forth in the defendant's plea to bring the case within the statute; several cases likewise were cited, which I shall not repeat because we admit them all, except the case in *P. 4 Hen. 7. pl. 9.*, which is so absurd that it cannot be law. They only prove that when a man will take advantage of a statute, he must set forth so much in his plea as to shew that the case is within the statute, which is certainly true. And we can by no means agree with my Brother *Agar* that to say in general, that it was corruptly and contrary to the form of the statute agreed, is sufficient: but it must be particularly shewn that this is such an agreement as the statute has declared void.

We therefore admit the rule of law: but the question is only on the fact, whether this sufficiently appears on this plea or not. In order to this it will be proper to take notice what are the words of the statute which are insisted on, and what it is that is set forth in the plea. The words of the statute (amongst others) are these; "If any person or persons shall bargain or sell any office or offices or deputation of any office or offices, or any part or parcel of them, or receive have or take any money fee or reward or any other profit directly or indirectly, or take any promise agreement covenant bond or assurance to receive or have any money fee reward or other profit directly or indirectly for any office, or offices &c, or to the intent that any person should have exercise or enjoy any office or offices &c, which office or offices &c shall in anywise touch or concern the administration or execution of justice, (and then it mentions several offices in particular) all and every such bargains sales promises bonds agreements covenants and assurances as are before specified shall be void." It is admitted that this office touches and concerns the execution of justice: it is expressly alleged that it was agreed between the plaintiff and the defendant that the bond in question should be given as a consideration that the plaintiff and his son should surrender their interest and estate in this office for the intent and purpose that the plaintiff should

1749, I.

HUGGINS
against
BAM-
BRIDGE.

should procure a grant of the same to be made to the defendant for his life; that this bond was accordingly given for the consideration aforesaid; that the plaintiff and his son surrendered their estate and interest in the office according to their agreement; that the office thereupon was granted to the defendant; and that such grant was made to him by the procurement of the plaintiff and according to the said corrupt agreement: and all this is confessed by the plaintiff's demurrer. If the office had been only surrendered by the plaintiff to the intent that the defendant might have the office, and the plea had said nothing more, it had been within the express words of the statute; and the case of *Sir A. Ingram* before mentioned, which goes no farther, is an express authority in point to this purpose. But the present case goes farther; and it is alleged also that the plaintiff was to procure a grant of the office to the defendant, and that he did procure it accordingly; so that I think there can be no doubt but he has brought his case within the express words of the statute.

We are therefore all of opinion that neither of the objections taken by the plaintiff is of any weight, and that judgment must be given for the defendant (a)."

(a) See the case of *Layng v. Paine*, *post*, *Trin.* 18 & 19 *Geo.* 2. and the cases there referred to,

T. 14 & 15

G. 2.

Friday,

June 12th.

Several tenants in common, wishing to make partition of their land, covenanted by deed to pay their respective shares of the survey

and allotments, and to abide by the award of certain arbitrators as to the allotments; the arbitrators allotted the whole in severalty but did not direct any deeds of conveyance to be executed to vest the allotments in the respective owners;—held that for this defect the award was bad, and that no action could be maintained on the covenant for not performing the award, though the covenantors were respectively liable on the covenant for nonpayment of the expence of the survey &c &c.

—No partition of land can now be made without deed.

—Where several persons covenant severally in respect of a joint interest, the covenant is joint notwithstanding the words *cum quolibet eorum*.

7 Mod. 345. *oct. ed.* 16 *Vin. Abr.* 221, pl. 8. *not.* S. C.

GEORGE JOHNSON *against* JOHN WILSON.

THE opinion of the Court was thus delivered by

Willes, Lord Chief Justice. "Covenant. It comes on upon a motion in arrest of judgment after a verdict, and has been spoken to several times by *Burnett* Serjt. and *Draper* Serjt. for the plaintiff and *Bootle* Serjt. for the defendant.

The

The action was founded on a deed dated the 24th of *February* 1737 made between the plaintiff and the defendant and several others for the portion of a certain undivided piece of pasture ground lying in *Seaton Carew* in the county of *Durham*, which deed recites that the common pasture or parcel of ground in the township of *Seaton Carew* known by the name of the *Marsh* and *Snook* or *Warren* then lay in common and undivided to the lofs and prejudice of the owners thereof, and that for remedying the said inconvenience the several owners thereof, to wit, the plaintiff the defendant and twelve others therein named had agreed that a partition and division should be made of all such part of the said undivided premises as the commissioners or arbitrators in such deed named or the survivors of them should think fit; and also recites (inter alia) that the several owners had lately laid out several sums of money in proportion to their several estates and interests in raising and making a fence and bank for keeping out the sea water, which bank was agreed to be supported and kept up by the several owners of the said undivided premises in proportion to their respective estates and interests; and it was thereby covenanted and agreed between them severally, and not jointly, nor one for another or for the acts of another of them, but each and every of them for his and their own acts only, that they would severally submit stand to abide and perform such award order and judgment for dividing &c the said undivided piece of ground according to their respective interests as five persons therein named or the survivors of them should make and award, so as such award should be declared and put in writing indented under their hands and seals on or before the first of *October* next ensuing the date of the said deed; and that they would consent and agree unto all and every lawful and reasonable act matter and thing which by the said arbitrators or the survivors of them should be thought fit and necessary towards the perfecting and completing of the said intended division in respect to the parts and proportions which each of the said owners should have and enjoy, and also touching and concerning the hedges ditches fences &c, and by whom the same should be repaired &c; and they further covenanted separately &c (as before) that the parts and portions set out by the arbitrators of the said undivided premises should be held and enjoyed as set out by the respective owners in severalty, and

1741.

JOHNSON
against
WILSON.

1741.

JOHNSON
against
WILSON.

that the said owners should pay their full and rateable parts and proportions of all such sums as had been expended or should be expended for or concerning surveying and allotting the premises or completing and confirming the said award or maintaining and defending the said division, all which sums should be paid from time to time into the hands of *Joseph Craggs Nicholas Johnson* and *George Johnson* (the plaintiff) or some or one of them; and it was likewise agreed by the said deed that the said fence or sea bank lately erected should be by the said arbitrators confirmed to be repaired and kept up at the charges of the said respective owners and their heirs in proportion to their respective estates and interests in the said undivided premises; and for the performance of the covenants in the said deed they severally bound themselves their heirs &c to each other in the penal sum of 300*l*.

The declaration then set forth an award in writing indented, made by the arbitrators under their hands and seals on the 29th of *September* 1738, by which they allotted several parts of the said undivided piece of ground to the several owners thereof, and (inter alia) they allotted to the defendant *Joshua Whitehead* and *Isabel Weemes* their heirs and assigns in full satisfaction of their estates and interests in the said undivided premises twenty-two acres of ground, bounded as is described in the award and declaration; and these three are ordered by the said award to maintain in respect of their said allotment all that fence on the north side thereof dividing the same from the allotment of *Anne Holt*, and all that wall or fence dividing the same from the said old sea banks towards the east. By the said award there is allotted to *Thomas Lackenby*, another of the owners, five acres for his share, bounded as is therein described and situated without the said new fence or sea bank; and the arbitrators awarded that the said *Thomas Lackenby* his heirs and assigns should for ever afterwards be acquitted and discharged from all charges and reparations for or about the said new fence or sea bank, any agreement entered into to the contrary thereof in anywise notwithstanding; and that the said *Thomas Lackenby* should with all convenient speed hedge off his said allotment &c from the rest of the premises. And by the said award were allotted to the plaintiff, *George Johnson*, thirteen acres, bounded as is therein described,

described, in full satisfaction of his share of the said undivided premises. And the said arbitrators further awarded that the said new fence or sea bank should with all convenient speed be sufficiently repaired &c, and not only the charges and expences of working and finishing the same &c but likewise the charges and expences of repairing and maintaining the said new sea bank &c from time to time should for ever afterwards be paid and discharged by the said several parties to the said deed (other than and except the said *Thomas Lackenby* &c) according to their respective estates and interests, and that the reparation of the said bank &c from time to time should be left to the management and discretion of the said *Joseph Craggs Nicholas Johnson* and *Katherine Johnson*, three of the owners, and their heirs or any two of them. And the arbitrators ordered that the residue of the said common should from time to time be held and enjoyed in common by all the parties to the said deed (other than the said *Thomas Lackenby*) according to their respective estates and interests therein. And lastly they awarded that the said parties should from time to time on request made by the said *Joseph Craggs Nicholas Johnson* and the plaintiff, or some or one of them, well and truly pay and contribute their rateable and proportionable parts and shares of such sums of money costs and charges as had been expended or should thereafter be expended touching the surveying allotting and setting forth the premises, or managing completing and establishing the said award or defending and maintaining the said partition, into the hands of the said three persons or some or one of them.

The plaintiff averred that he had well and truly observed and always been ready to perform the said award; and assigned three breaches in the defendant,

1st, That he and *Joshua Whitehead* and *Isabel Weemes* had not nor had any of them made any hedge or fence to divide the said twenty-two acres allotted to them, according to the form and effect of the said award, but had neglected so to do, contrary to the form and effect of the said covenant of the said defendant so made with the said plaintiff as aforesaid.

2dly, That soon after the making of the said award the three surveyors did repair and make the said new fence or sea bank,
and

1741.

JOHNSON
against
WILSON.

1741.

JOHNSON
against
WILSON.

and the charges and expences of finishing the same amounted to a certain sum, to wit, to the sum of 84*l.* 6*s.*, whereof the defendant had notice and was requested by the said three surveyors *Joseph Craggs Nicholas Johnson* and *K. Johnson* to pay to them his share and proportion of the said charges &c according to his estate and interest therein, but he did not pay the same to them or any of them according to the form and effect of the said award, but refused so to do, contrary to the form and effect of his covenant &c.

3dly, That divers sums, amounting in the whole to a certain sum, to wit, 33*l.* 6*s.* 9*d.* were laid out and expended touching and concerning the surveying allotting and setting forth the premises and managing and completing the said award, of which the said *Joseph Craggs Nicholas Johnson* and the plaintiff gave notice to the defendant and requested him to pay them his rateable and proportionable share of the same, but he did not pay the same to them or any of them according to the form and effect of his said covenant &c, but neglected and refused so to do contrary to the form and effect of the covenant; and the said defendant, though often requested, had not kept his covenant with the plaintiff, but had denied and still did deny to keep the same, by which he said that he was injured and had damage to the value of 100*l.*

The defendant let judgment go by default, and a writ of inquiry was executed in *Northumberland*, where the action was brought; and the jury found damages for the plaintiff on the first breach 10*d.*, on the second 1*d.*, and on the third 1*d.*, and found 40*s.* costs.

It was insisted in arrest of judgment;

First, That the award was void, and that therefore the covenants to perform it must be void too;

Secondly, That the covenants were joint, and that therefore all the parties to the deed ought to have joined in the action.

As to the first; it was agreed by the Court that if the award were void the covenants to perform it were void too. As if a bond be entered into to perform the covenants in a lease, if the
lease

lease become void, the bond also is void. And for this purpose were cited 1 *Sid.* 309. *Jevons v. Harridge*; and 1 *Lev.* 45. *Caponburst v. Caponburst*; both which are cases in point.

1741.

JOHNSON
against
WILSON.

The principal question therefore upon this head is whether the award be void or not. The objection to the award is that it hath not directed by what deeds the partition shall be completed, and therefore it is an imperfect award; to which it has been answered that it is in itself a complete partition, and that it sufficiently vests the estates and interests in the respective parties without any farther conveyance; for which purpose were cited *Lit. Sect.* 244; *Co. Lit.* 166, 169. But *Littleton* speaks only of partners. The other indeed relates to tenants in common, but is explained in *fo.* 169, where the words are thus; "A partition by joint tenants is not good without deed, but tenants in common may make partition by parol, and if they execute the same by livery this is good and sufficient in law; and therefore where the books say that joint tenants may make partition without deed, it must be intended of tenants in common and executed by livery." And then he goes on and shews a great difference between joint tenants tenants in common and copartners; so that the rules laid down as to the one do not hold as to the others. This was before the statute 29 *Car.* 2. when a feoffment might be by parol; and the livery, which is mentioned, supposes that a feoffment was intended, which would then have been a proper conveyance; so it is implied that there must be an effectual conveyance. And therefore, as since the statute of 29 *Car.* 2. no conveyance can be but by deed, a proper conveyance is now become necessary; and for this reason the award is incomplete and not good.

But it was said that an award may be good in part and bad in part (a); and so, to be sure, it may; but here the partition is the substance of the award, and every thing awarded to be done depends on it. If therefore the partition be not well awarded, the whole award must fall, or at least the two first breaches must fail, which are both founded on the award. But the third breach (as I shall take notice by and by) is founded merely on the covenant and not at all on the award.

(a) Vid. *Candler v. Fuller*, *sup.* 62.

1741.
JOHNSON
against
WILSON.

Secondly; as to the second objection that the covenant is joint, and that therefore the action ought to have been a joint action brought by all the parties to the deed, it is founded merely upon this mistake that the parties to the deed are joint tenants; in which case it has been always holden that though persons covenant severally yet if the estate or interest of the covenantors be joint the covenants will be joint notwithstanding the words cum quolibet eorum. For the wording of the covenants cannot make that, which was before joint (a), several; and it is so expressly holden in *Slingby's case*, 5 Co. 18 b. 19 a; and in *Skin.* 401; *Comb.* 115; and 1 *Saund.* 153; so that this objection falls to the ground, the covenantors being undoubtedly tenants in common and not joint tenants, and the covenants being all several (b).

Besides the last breach is on a covenant merely collateral to the estate and the award; for the parties ought to pay the expence of the award in proportions, though no award or partition be made. And so it is like the case of *Northcote and Underbill*, *Salk.* 199 (c), where *Holt Ch. J.* held that a distinct separate and independent covenant may be good, though the estate do not pass by the deed. Nor is this case liable to the objection in the case of *Coleman v. Sherwyn*, *Carth.* 97, that if several actions should be permitted the defendant might have damages recovered against him two or three times for the same thing. For here each man's part of the expences may be easily ascertained, and the plaintiff will recover damages for no more than he has been obliged to pay more than his share by the defendant's not paying his share; and by the smallness of the damages found it is plain that he has recovered no more.

(a) In *Mansell v. Burredge* and another, 7 *Durnf. & East* 352. where two several tenants of a farm agreed with the succeeding tenant to refer certain matters in difference respecting the farm to arbitration, and jointly and severally promised to perform the award, and the arbitrator awarded each of the two to pay a certain sum to the third, it was holden that they were jointly responsible for the sum awarded to be paid by each.—If lessees covenant jointly and severally at the beginning

of their covenants, all their subsequent covenants are joint as well as several, notwithstanding the intervention of covenants on the part of the lessor. *The Duke of Northumberland v. Errington.* 5 *Durnf. & East* 522.

(b) Where the covenant is joint and several, in an action against one only the breach may be assigned in the neglect of both. *Lilly v. Hedges*, 1 *Str.* 552.

(c) 1 *Lord Raym.* 388. S. C.

But

But the doubt which stuck with me, and was the reason why I gave no judgment when the case was put into the paper, was that the plaintiff not having averred that he had performed the covenants on his part it did not appear that he had received any damage by the defendant's not having paid his share of the expence, because it did not appear that he had paid any thing himself: but on consideration I think there is no weight in this objection.

1741.

JOHNSON
against
WILSON.

For these being mutual covenants, the rule is the same as in mutual promises, that the plaintiff need not aver that he has performed his part, as he must have done if the one had been expressly the consideration of the other (a). But where it is not so, each may maintain an action for the breach. And this difference is fully established and settled in the case of *Thorpe v. Thorpe*, 1 *Lutw.* 249, where a great many cases are cited for this purpose. And as the defendant has let judgment go by default, and the jury have found some damages, it must be taken for granted now that the plaintiff has received damage by the defendant's not paying his share of these expences.

So judgment must be arrested as to the two first counts (b), and judgment for the plaintiff on the third (c)."

(a) Vid. not. to *Acherley v. Vernon*,
sup. 157.

(b) Breaches; there was only one count.

(c) Mr. J. Fortescue A. was absent, but
he concurred in the above opinion.

HENRY KARVER, Executor of B. KARVER, *against*
THOMAS JAMES (a).

Trin. 14 & 15
Geo. 2.
Friday,
June 12th.

"THIS was an action upon promises made by the defendant to the plaintiff's testator; to which the defendant pleaded first the general issue, and secondly that the several causes of

In pleading
a writ sued
out within six
years after
the cause of
action arose,

in order to save the statute of limitations, it is necessary to allege that the writ was returned.

—Stating that the party sued out a *capias*, without an original, is sufficient for this purpose.

—Even though the *capias* be returnable on a common return-day, and not on a day certain; for such a writ is only voidable, not void.

(a) *Bull. N. P.* 150, 1.; and 7 *Mod.* | *Cawer v. James* in the former and *Carver*
348. oct. ed. S. C.; by the name of *v. James* in the latter.

action

1741.

KARVER
against
JAMES.

action in the declaration mentioned did not accrue within six years next before the suing out of the original writ &c.

The plaintiff replied that his testator who was one of the attornies of this court, on the 26th of *April* in *Easter* term, 5 *Geo. 2.*, sued out a writ of privilege against the defendant to answer him in a plea of trespass on the case on the morrow of the *Holy Trinity* then next, but that the sheriff of *Herefordshire* (to whom it was directed) did nothing thereupon, nor did he send back the said writ; therefore the plaintiff's testator sued out another writ &c, returnable in the then next *Michaelmas* term &c; and so on twenty other writs of the same kind, stating them and the days when they were returnable, but it stated that neither of them had been returned by the sheriff, and it did not state that any one of them had ever been delivered to him; that before the return of the last writ namely on the 28th of *July* 1737 *B. Karver* (the plaintiff's testator) died; recently after whose death the plaintiff sued out the writ (a *capias*) in this case in *Trinity* term, 11 & 12 *Geo. 2.*, for recovering the damages by reason of not performing the several promises in the declaration mentioned; that the several writs of privilege so prosecuted by *B. Karver* in his lifetime against the defendant were prosecuted by him with an intent to have impleaded the defendant of and upon the several promises in the declaration specified; and that the writ so prosecuted by the plaintiff against the defendant was prosecuted against him with intent to implead him for the causes of action in the declaration specified and upon his appearance to declare against him for the said several causes of action, and that he (the plaintiff) according to his said intention afterwards on &c declared against the defendant here &c; with an averment that the several causes of action accrued within six years next before the suing out of the writ of privilege first above specified by *B. Karver* &c.

To this replication the defendant demurred specially, and shewed for cause of demurrer that the writ of privilege first above specified was void for want of a sufficient return &c.

This case was argued on the 10th of *May* 1740 by *Boole* Serjt. for the defendant, and *Burnett* Serjt. for the plaintiff;

and the opinion of the Court was now delivered, as follows, by

1741.

KARVER
against
JAMES.

Willes, Lord Ch. J.—“There is but one cause of demurrer assigned, but four objections have been taken at the bar.

1st, That the first writ is not good, because it is returnable on a common return-day, whereas it ought to have been on a day certain; so all the continuances fall to the ground.

2dly, That the first writ was never returned, so all the continuances fall for the same reason.

3dly, That the *capias* is not sufficient; that the replication ought to have set forth an original.

4thly, That it does not appear that the plaintiff took out the *capias* as executor, and so this is not within the equity of the stat. 21 Jac. 1. c. 16. s. 4. (a).

We are all of opinion that the plaintiff cannot have judgment, though not for the same reasons; and therefore I shall begin with the third objection first, in which we are all agreed.

3dly, We are all agreed that the *capias* is sufficient, without setting forth the original; it being now the constant course of

(a) By that clause it is enacted that if judgment be given for the plaintiff and reversed by error, or the judgment be arrested, or if the defendant be outlawed and the outlawry be reversed, “in all such cases the party plaintiff his heirs executors or administrators, as the case shall require, may commence a new action or suit from time to time within a year after such judgment reversed or such judgment given against the plaintiff or outlawry reversed, and not after”. But within the equity of that section the courts have allowed an executor or administration within a year after the testator’s or intestate’s death to renew a suit commenced by the testator or intestate, 1 *Lutw.* 260; *Willcox v. Huggins*, *Fitzg.* 172; 290; 2 *Str.* 906. And in *Lethbridge v. Chapman*, 15 *Vin. Abr.* 103. and cited in *Willcox v. Huggins*, that indulgence was extended to fourteen months after the intestate’s death. So if there be any delay in granting administration on account of any suit respecting the will,

the time may be extended. 2 *Strange* 906. No precise time indeed appears to have been fixed: but in *Fitz. Lee J.* said “I think it should be in nature of journeys accounts, which is a taking up and pursuing of the old action in a reasonable time, which is to be discussed by the discretion of the justices, 6 *Co. Spencer’s* case. And by the same rule I think what is or is not a recent prosecution in a case of this nature is to be determined by the discretion of the Court from the circumstances of the case: but generally the year in the statute is a good direction.”—Where an act of parliament for dividing and allotting lands directed all disputed claims to be tried by a feigned issue, and limited the time for bringing such actions to six months, it was holden that an action brought within the time but which abated by the death of the defendant must be revived against the heir within six months afterwards. *Knight v. Bate*, *Cowp.* 738.

1741.

KARVER
against
JAMES.

the Court to take out a *capias* without an original. That a *latitat* is sufficient has been several times determined in the King's Bench. It was so expressly holden in *Culliford v. Blandford* (a), *Cartb.* 233, 4, and *Dacy v. Clinch*, 1 *Sid.* 53; and in the case of *Hollister v. Coulson*, *P.* 9 *Geo.* 1. nowhere reported (b). And yet that is not the first process; for a *latitat* as much presupposes a bill of *Middlesex* as a *capias* presupposes an original. And according to the reason of these cases it was expressly adjudged in this court *M.* 3 *Geo.* 2. in *Lethbridge* administrator of *Richards v. Chapman* and wife that a *capias* in this court was sufficient, without setting out the original; a case exactly parallel to this, but not to be found on the rolls, it not having been brought in.

4thly, In this likewise we agree that the *capias* was taken out by him as executor. It is said in the beginning of the declaration that the plaintiff brings this action as executor; and then it is said that the said *H. Karver* took out a *capias*; and it is alleged that the *capias* was the process in this suit, in which the defendant appeared, and on which the plaintiff declared.

1st, As to the first point Mr. J. *Fortescue A.* is of opinion that, this process being erroneous, all the continuances founded upon it are void. But we three (c) are of opinion that it is only voidable, and not void; and that therefore if it had been returned, it would have supported the continuances. That it is voidable, and not void, and that the sheriff is obliged to return it, was holden in *Popb.* 205.; and that is a stronger case than this, because there the *capias* was returnable on a *dies non juridicus*, namely, on *All-Souls-Day*. If therefore the sheriff had returned this writ, we think it had been well enough.

2dly, As to the second objection; Mr. J. *Fortescue A.* is of opinion that the writ need not be returned; and to be sure it was so adjudged in this court in the case of *Kinsley v. Heyward*, reported in 1 *Lutw.* 256 and 260. But even there Mr. J. *Blencowe* was of another opinion; and the reason on which the

(a) The judgment in which case was affirmed in the Exchequer-Chamber, on error brought; 1 *Lord Raym.* 78.

(b) Since reported in 1 *Str.* 550.

(c) *Willes* Ld. Ch. J.; Mr. J. *W. Fortescue*; and Mr. J. *Parker*.

other Judges went was that it did not appear in that case whether the first writ were returned or not; they said they would intend that it was returned unless the contrary were shewn on the other side. But that cannot be intended in the present case, because it is not even alleged that the writ was ever delivered to the sheriff, and it is expressly alleged that the sheriff never returned it. And even this resolution of this Court though founded on stronger circumstances than appear in the present case was afterwards reversed in the Court of King's Bench, where it was expressly holden that the plaintiff ought to plead that he had delivered the writ to the sheriff, and that it was returned^(a); and this judgment was affirmed in the House of Lords on the 1st of May 1702. There is also another case exactly to the same purpose in 1 *Lutw.* 279, 280, *Brereton & Ux. v. Moyse*; where the same judgment was given in *B. R.* ^(b), and (as it is said) for the same reasons as in the case of *Kinsley v. Hayward*. These cases seem to be founded on the reasons given, and the rules laid down, in *Spencer's case* 6 *Co.* 10., which though laid down in respect to journeys accompts yet hold equally strong in the present case. And it appears by the case of *Green v. Rivett*, *B. R.* 13 *An. Salk.* 421, which is after both those cases that the method now is to return non est inventus on the first writ, and then to continue ^(c) the rest by a vicecomes non misit breve.

1741.

KARVER
against
JAMES.

As

^(a) See also *Brown v. Babbington*, 2 *Ld. Raym.* 883; *Atwood v. Burr*, 7 *Mod.* 3; and *Harris v. Woolford*, 6 *D. & E.* 617. But where an action must be brought within three months, it is sufficient for the plaintiff to prove a latitat sued out within the time and his declaration within a year afterwards, without shewing the writ returned. *Parsons v. King*, 7 *D. & E.* 6.

^(b) Reversing the judgment given in *C. B.*

^(c) In *Brown v. Babbington*, 2 *Ld. Raym.* 880. it was holden (contrary to the opinion of Mr. J. Powell) that an action of assumpsit could not be considered as a continuation of an action commenced by a writ of clausum fregit sued out within time, so as to prevent the statute of limitations attaching. So in *Smith one &c v. Bowen*, 3 *D. & E.* 662. it was ruled that an attachment of privilege

could not be pleaded as a continuation of an action commenced by the same plaintiff by a bill of *Middlesex*, to avoid the statute of limitations. But in *Lord Middleton v. Forbes*, it was decided that an action by original brought by an administratrix within six years after the cause of action accrued would enable the administratrix and her husband (whom she afterwards married) to recover in an action by bill by both, notwithstanding a plea of the statute of limitations. "*Broderick Lord Viscount Middleton v. Forbes and Wife.* Error in the Exchequer-Chamber. On the pleadings the case was this. *Forbes* and *Eliza* his wife, administratrix of *John Couchmaker* her late husband, brought their bill in the King's Bench against the defendant (the plaintiff in error) for monies laid out by the intestate. The defendant pleaded non assumpsit; and non assumpsit

1741.
 KARVER
 against
 JAMES.

As therefore this matter has been so solemnly determined by the Court of King's Bench upon a writ of error from this Court, and by the superior court of judicature the House of Lords, I think we ought to acquiesce in these determinations, and to give our judgment accordingly, even though we were of a different opinion ourselves. But I own, for my own part, I should have been of that opinion, if there were no such determinations. For it is strange to me how a writ can be continued that was never returned. And besides it would be greatly inconvenient if a plaintiff might sue out a writ, and keep it in his pocket for six years together, of which the defendant could not possibly have any notice, and then enter it in this manner and continue it down, to avoid the statute of limitations.

But we are all, though for different reasons, of opinion that judgment must be for the defendant (a)."

assumpsit infra sex annos. The plaintiffs replied that *Eliza*, when a widow, si. on the 2d of January 18 Geo. 2. brought her original writ, and before the return she married *Forbes*, and they recently afterwards 14th January 19 Geo. 2. exhibited their bill against the defendant. The defendant rejoined that *Eliza* married *T. Jekyll*, who was alive on the 5th of June, the time of issuing the original. The plaintiffs surrejoined, and tendered an issue; to which the defendant demurred.

Upon judgment given for the plaintiff in the King's Bench (1) without any argument, a writ of error was brought in the Exchequer-Chamber; where

Ford for the plaintiff in error argued that the suit was abated by marriage, the voluntary act of the party. That the stat. 21 Jac. 1. c. 16. s. 4. was a law of peace for the security of property, and ought not to be extended by construction. 1 Lev. 31. 1 Lutw. 261; 6 Co. 9, 10. Besides a suit commenced by bill cannot be continued by original.

For the defendants in error, it was insisted that there was no discontinuance. That the new suit was brought within a reasonable time, namely within two

terms, whereas it has been holden that a year is a reasonable time. *Hayward v. Kinsey*, 1 Lutw. 256; 1 Ld. Raym. 432; 2 Inst. 476. That the statute of limitations ought not to receive a literal but an equitable construction. 2 Saund. 120; 2 Mod. 71; and 1 Lev. 31. As to the commencement of the suit by original and the suit afterwards by bill, the reason for it is evident; then the defendant was in custody of the marshal, and being in such custody the plaintiffs could only proceed by bill. It is also observable that this is a suit jure alterius, and not in jure proprio.

By the Court. The statute has received a favourable construction. The suit was originally brought within the six years, and the new suit within two terms. No disability can be pleaded to an administratrix. And the statute does not bar the action, it only takes away the remedy. T. 5 Geo. 2. B. R. *Willcox v. Huggins*, P. 9 Geo. 2. B. R. *Usherwood v. Nevil*, Salk. 454. And the judgment of the King's Bench was confirmed by all the Justices and Barons." MS. *Abney J.*

(a) See *Hickman v. Walker*, M. 11 Geo. 2. sup. 27.

(1) 2 Str. 1241. S. C. in B. R.

1741.

PERCEVALL HUTCHINSON *against* WILLIAM STURGES.

T. 14 & 15
G. 2.
Friday,
June 12th.

[H. 14 GEO. II. Rol. 444.]

DEBT on a bond for 8*l.* given by the defendant to the plaintiff, one of the bearers of the virges of the King's household and an officer and minister of the King's Court of his palace at *Westminster*; dated the 25th of *July* 1740.

The defendant pleaded that the plaintiff was indebted to the defendant in 10*l.* for work and labour &c, in 10*l.* for goods sold and delivered &c, and in 5*l.* for money had and received &c, amounting in the whole to the sum of 25*l.*, which exceeds the debt of the plaintiff, and which the defendant offered to set off &c according to the statute &c.

The plaintiff prayed that the condition of the bond might be inrolled, and then demurred to the defendant's plea. The condition of the bond was for the appearance of *S. Daniel* before the Judges of the King's Court of his palace at *Westminster* at the next Court of the King of his palace to be holden at *Southwark* in the county of *Surry* on *Friday* the 25th of *July* to answer *T. Squier* in a plea of trespass on the case, to his damage of 99*s.*

This case was argued on the 7th of *February* 1740 by *Bootle* Serjt. for the plaintiff, and *Agar* Serjt. for the defendant; and now the opinion of the Court was given as follows, by

Willes, Lord Chief Justice. "The question is whether these debts which the defendant sets forth in his plea can be set off against the plaintiff's demand. There are two statutes (a) in relation to this matter; and it will be proper to consider under which statute this falls, and how the determinations have already been in the construction of them.

The words of the first statute, which is the 2 *Geo. 2. c. 22. s. 11.*, are "where there are mutual debts between the plaintiff

Under the
stat. 8 G. 2.
c. 24. no
debt on bond
can be set
off, unless it
be on a bond
for securing
the payment
of money.
—Conse-
quently a
bail-bond
cannot be
set off under
that act.
—Nor can
such a bond
(given to an
officer of the
palace court)
be set off un-
der the stat.
2 G. 2. c. 22.
to an action
brought
against that
officer on a
simple con-
tract.
—But a bail-
bond assigned
over by the
sheriff to the
party may
be set off to
an action
brought by
that party;
semb.;
though in
such case the
penalty of
the bond will
be considered
as the debt.
Bull. N. P.
179. S. C.

(a) See 2 *Burr.* 824; 1024, 5; 1230; and 4 *Burr.* 2221.

1741.
HUTCHIN-
SON
against
STURGES.

and the defendant, or if either party sue or be sued as executor or administrator where there are mutual debts between the testator or intestate and either party, one debt may be set against the other, and such matter may be given in evidence on the general issue or pleaded in bar as the nature of the case shall require;" and if intended to be given in evidence, notice shall be given &c. Upon the construction of this statute several questions arose before the making of the stat. 8 Geo. 2. c. 24;

1st, Whether debts on simple contract could be set off in common cases against a debt on specialty;

2dly, If in common cases, whether they could where an executor or administrator is plaintiff;

And 3dly, Whether in the case of a bond the penalty was to be considered as the debt &c.

In *Kemys v. Betson* (a) Tr. 6 Geo. 2. in B. C. it was holden in the case of an executor that simple contract debts cannot be set off against debts on specialties, for that the debts must be of an equal nature; otherwise such a construction might occasion a devastavit. I should have been of the same opinion before the stat. 8 Geo. 2., but not for the same reason. For if a statute orders it to be so, it will justify the executor, and it will be no devastavit in him; and of this opinion was Lord *Hardwicke* in the case of *Brown v. Holyoak*, which I shall mention by and by. The true reason is that this was only substituted in the room of an action, to prevent circuity or a bill in equity. It was therefore held that you cannot set off a debt barred by the statute of limitations, because you cannot recover it by action. This judgment was never reversed. And in the case of *Joy v. Roberts* in the Exchequer M. 6 Geo. 2. there was the same resolution. But in the case of *Stephens v. Loftyn* (b) M. 6 Geo. 2. this Court carried it farther, and held in the case of an action upon a bond between common persons a debt upon simple contract which was pleaded could not be set off, going upon this reason that there ought to be the same construction on every part of the act: but in this I think they were mistaken; for where the cases are different the construction ought to be different too. And of this opinion were the Court of King's Bench, when it came before them on a writ of

(a) 8 Vin. Abr. 561. pl. 30.

(b) 8 Vin. Abr. 562. pl. 31.

error (a), and would have reversed the judgment but for another objection, the debt pleaded being less than the penalty though more than the money due by the condition; and this being a case before the stat. 8 Geo. 2. they held, and I think very rightly, that at law the penalty must be considered as the debt. And in the case of *Brown v. Holyoak* (b) P. 8 Geo. 2. B. R. on a writ of error out of this court, the Court of King's Bench reversed the judgment of this Court which had determined that a debt on simple contract could not be set off against a debt due for rent; and I think that the judgment was rightly reversed for the reasons I have already mentioned. In that case Lord *Hardwicke* said it would not work a devastavit, and seemed a little to doubt how it would be in the case of executors. But his doubt was removed by the statute 8 Geo. 2. c. 24. passing just at that time. By that statute it is enacted that mutual debts may be set against each other either by being pleaded or given in evidence on the general issue, though such debts are deemed in law to be of a different nature, unless in cases where either of the said debts shall accrue by reason of a penalty in the bond &c, in which case the debt intended to be set off shall be pleaded in bar, in which plea it shall be shewn how much (c) is truly and justly due on either side; and in case the plaintiff recovers, judgment shall be entered for no more than is truly and justly due to the plaintiff after one debt is so set off against the other. This statute has solved all the difficulties before mentioned.

But as this is not a bond with condition for the payment of money, we are all of opinion that the case is not within this statute, but must stand on the stat. 2 Geo. 2. For we are of opinion that the debts pleaded cannot be set off in the present case, this being a bail-bond, and the plaintiff not suing in his own right but in the nature of a trustee for *Squier*. If this were otherwise, all bail-bonds might be defeated. But it might be as well said that when a man sues as executor the defendant may set off a debt due from the plaintiff to the defendant in his own

(a) Vid. Sir *W. Kell.* 139; 2 *Barnard.* 338; and 8 *Vin. Abr.* 562. pl. 33.

(b) *Barnes* 290; 8 *Vin. Abr.* 562. pl. 32, and 35; and *Bull. N. P.* 179.

(c) The defendant in pleading a set-off, to debt on bond, must set out the sum

justly due on the bond; and that averment is traversable. *Symmons v. Knox*, 3 *Durnf. & E.* 65; even though laid under a videlicet, *Grimwood v. Barrit*, 6 *D. & E.* 460.

1741.
HUTCHIN-
SON
against
STURGES.

right (a), as that the defendant can set off in the present case; and yet that is contrary not only to common sense but also to the plain words of the statute. If indeed this had been a bond to the sheriff assigned over to the party according to the statute, we should have thought otherwise, and that the penalty must be considered as the debt, this not being a case within the statute 8 Geo. 2. But the bond here being sued by the officer himself, we are all of opinion that the debt due from the officer cannot be set off, and that judgment must be for the plaintiff."

(a) Nor, when an executor sues for a cause of action arising after the testator's death, can the defendant set off a debt due to him from the testator. *Shipman v. Thompson*, T. 11 & 12 Geo. 2. C. B. sup. 103; and *Tegetmeyer and another, executors, v. Lumley*, T. 25 G. 3. B. R. The latter was an action of covenant for rent, part of which became due in the testator's lifetime, and part since his death. The defendant at the trial, before Lord Mansfield at the sittings after Easter term 25 G. 3., set off a debt due from the testator to him, and the plaintiffs were nonsuited.

Erskine moved for a new trial, on the ground that this could not be set off; and cited *Rydout assignee v. Brough*, Cowp. 133. *Shipman v. Thompson* (1) Bull. N. P. 180, and *Kilvington executor v. Stevenson*, which he read from a note of Mr. Justice Yates. "Assumpsit as executor for goods of his testator. There were two pleas; 1st, non assumpsit; 2dly, a set-off for a debt due from the testator to the defendant. To this the plaintiff demurred. And *Wallace*, in support of the demurrer, insisted that the plea was bad, and that the defendant could not set off a debt owing

to him by the testator in satisfaction of the present demand, as that would be altering the course of distribution, and he might by that mean be paid before creditors of a superior nature. Mr. Solicitor-General, who was to have argued on the other side, mentioned the stat. 2 G. 2. c. 22. s. 13. *Per Curiam*. The plea is clearly bad. This is not an action for goods that were in his hands at the testator's death, in which case he might set-off; but for goods he has taken possession of since his death, in which case to allow the set-off would be altering the course of distribution. Judgment for the plaintiff."

Cooper shewed cause against the rule: here the executors unite both their demands; and this case differs from those cited. The balance only ought to be paid. And as to the inconvenience of altering the course of administration, the executors have put themselves in this situation.

Erskine, who was going to argue in support of the rule, was stopped by

Lord Mansfield Ch. J., who said he was satisfied on the point, on the authority of the case of *Kilvington v. Stevenson*.

Rule absolute.

WILLIAM WARD *against* WILLIAM CRESWELL.

TO replevin for taking six boat oars at *Creswell Haven* otherwise *Creswell Boat Landing* in the parish of *Woodborn*;

There was an avowry that the locus in quo was the soil and freehold of the defendant, and that the goods were doing damage there &c.

The plaintiff pleaded in bar, first, that *E. Cook* was seised in fee of one moiety of the place in which &c, and that he gave the plaintiff license to lay and place the goods there, traversing that the locus in quo was the soil and freehold of the defendant; on which issue was taken and found for the defendant.

Secondly, That the locus in quo for time immemorial hath been a certain piece of waste ground in the township of *Creswell* and parish of *Woodborn* containing three acres lying contiguous to the sea, and that *E. Cook* was seised in fee of "certain ancient tenements consisting of divers messuages and several to wit 200 acres of land with the appurtenances," and that he and all those whose estate he has in the said tenements with the appurtenances have from time immemorial had and been accustomed to have for themselves and their farmers and servants common of fishery with *two boats* in the sea there every year at all seasonable times of fishing in the year as belonging and appertaining to the said tenements with the appurtenances, and to have for themselves their farmers and servants the liberty of landing and putting on shore their said fishing-boats on the place in which &c for the necessary use of the said common of fishery; that the plaintiff as the servant of *E. Cook* and by his command at the time of taking &c, being a seasonable time of fishing, with a boat fished in the sea there, using the said common of fishery there, and on that occasion at the same time of taking &c landed and put on shore the said fishing-boat in and upon the place in which &c, the said six boat oars then being in the said boat and part of the tackle and furniture there &c, whereupon the defendant of his own wrong took the said boat oars &c.

3 Y

There

1741.

T. 14 & 15

G. 2.

Monday,

June 15th.

The right of fishing in the sea is a right common to all the King's subjects; and therefore a prescription for such a right as annexed to certain tenements is bad.

16 Vin. Abr.

354. S. C.

1741.

WARD
against
CRESWELL.

There was a third plea in bar, similar to the second, except that instead of claiming the right of fishery with *two boats* the right was claimed generally "with their boats."

To the two last pleas there were general demurrers.

After two arguments at the bar, the first by *Draper* Serjt. for the defendant and *Bootle* Serjt. for the plaintiff on the 21st of *November* 1738, and the other by *Burnett* Serjt. for the former and *Prime King's* Serjt. for the latter on the 16th of *June* 1740, the judgment of the Court was delivered, as follows, by

Willes, Lord Chief Justice. "It was said by the counsel for the defendant, and not contradicted by the counsel for the plaintiff, that there has been a verdict for the defendant on the first plea; so it comes before the Court only upon the demurrer to the second and third pleas.

To the second plea it was objected

First, That the prescription was too general and uncertain, being laid to be appurtenant to "certain ancient tenements consisting of divers messuages and several, to wit, two hundred acres of land."

Secondly, That the prescription was void, because the plaintiff insists on his right as a particular right of common appurtenant to certain tenements, whereas it is a general right for every subject of *England* to fish in the sea of common right.

Thirdly, That the plaintiff had not brought his case within the prescription; he not having averred that the boat in question was necessary for the enjoyment of his common of fishery, or that it was necessary for that purpose to land it on the place in question.

To the third plea the same objections were taken, and two more,

First, That the prescription was not laid for any certain number of boats, and therefore void.

Secondly, That the prescription is to fish *with their boats*, and that the plaintiff has not said whose the boat in question was.

We

We think that there is something in most of these objections: but as we are all clearly of opinion that the second objection, which goes to both pleas, is unanswerable, I shall say the less upon the rest.

1741.
WARD
against
CRESWELL.

The first objection likewise goes to both pleas. It consists of two parts; it is objected 1st, That "tenements" is too general a word; and 2dly, That the prescription is only claimed in respect of *certain* ancient tenements &c, without saying how many, or whether it be claimed for all or for each of them, and it cannot be claimed jointly for several. It is said that the word "tenements" is too uncertain, unless ascertained by other words, as the messuage or tenement called *The Black Swan* &c: but we do not rely upon that. The other part of this objection seems to be fatal. In *Basket v. Lord Mordant*, *Dyer* 164. a., and *Bendl.* 74., it was ruled that if a man, having common in a waste for one hundred sheep as appurtenant to a house and certain acres of land, purchase another messuage with certain lands which also has common in the same waste for other one hundred sheep as appurtenant, he cannot make title in pleading by prescription in the entire for common appurtenant to both houses and lands together for two hundred sheep, but must make two several titles and prescriptions for the two hundred sheep. The same doctrine is laid down in *Palmer* 362.

The third objection, which also applies to both the pleas, seems to be fatal. We think it is sufficiently set forth that the boat was necessary for fishing, but it is not sufficiently shewn that it was necessary to land it on the defendant's land (a).

The first objection to the third plea appears to have but little weight; for if a man have a right to fish, he may fish with as many boats as he pleases.

But the second objection to the third plea seems to be of weight, that the plaintiff should have shewn that it was a boat of *E. Cook* or his farmer or servant; the prescription confining it to *their boats* in this plea.

(a) See *Peppin v. Shakespear*, 6 Durnf. & East 648.

But

1741.
WARD
against
CRESWELL.

But we are all clearly of opinion on the second objection, which equally applies to both pleas, that the prescription is void, because the right claimed as annexed to certain tenements is a general right for all the subjects of the kingdom (a). In *Pell v. Towers*, Noy 20, it was agreed "that a man shall not prescribe in that which the law of common right gives." So in *Bro. Abr. title "prescription" pl. 71*. Now "every man may fish in the sea of common right," 8 *Edw. 4. 19. a.* In *Warren v. Matthews*, 6 *Mod. 73*, and *Salk. 357*, it was holden that "every subject of common right may fish with lawful nets in a navigable river as well as in the sea." So is 1 *Mod. 105*. And this is not merely the law of this country, but is also the law of nations. *Grot. de Jure Belli et Pacis, b. 2. c. 3. f. 9.* And *Bracton, l. 1. c. 12. f. 6.* says *Publica vero sunt omnia flumina et portus: Ideoque jus piscandi omnibus commune est in portu et in fluminibus.* This prescription therefore for a right common to all the subjects of the realm cannot be supported. A man might as well prescribe that he and all those whose estate he has have a right to travel on the King's highway as appurtenant to his estate.

For these reasons, as the defendant has had a verdict for him on the first plea, and as we are of opinion that the plaintiffs second and third pleas in bar are both bad, judgment must be for the defendant."

(a) See *Carter v. Murcot*, 4 *Burr. 2163*; 4 *D. & E. 437*, and 2 *H. Bl. Rep. 182.* and the Mayor &c of *Lynn v. Turner*,

Trin. 14 & 15
Geo. 2.
Wednesday,
June 17th.

The parties
having sub-
mitted all
matters in
difference to
arbitration,
the arbitrator
determined
all matters
(except one)
and gave li-

berty to one of the parties to prosecute that matter if he chose; the award was holden bad in toto.
2 *Mod. 349. oct. ed. S. C.*

BRADFORD against BRYAN.

DEBT on a bond for 50*l.* dated 30th July 1739.

The defendant cravedoyer of the bond and condition, by which it appeared that the bond was given for the performance of an award to be made by *E. Eastway* of and concerning all actions causes of action suits &c and demands whatsoever be-

tween

tween the said parties so as the said award should be made on or before the 8th of *August* 1739; and then he pleaded that the arbitrator did not make any award on or before the 8th of *August*.

1741.
BRADFORD
against
BRYAN.

The plaintiff replied that the arbitrator made his award on the 8th of *August* 1739, in which the arbitrator awarded that all suits commenced or depending by or between the said parties at any time before the 30th of *July* should cease; that the defendant should on or before the 23d of *October* then next pay to the plaintiff 14*l.* 16*s.* 6*d.* in full of all demands, and that the plaintiff should on or before the said 23d of *October* pay to the defendant 16*s.* 6*d.* for all tithes and *Easter* duties whatsoever ("except the tithes of calves, if the same were tithable, and which the arbitrator excepted out of his award, it being agreed by the defendant by writing under his hand and proved before the arbitrator that the same should remain until an agreement were made with the rest of the parishioners whether the same ought to be paid or not") due to him as rector of the parish of *Glist St. Mary* to the 30th of *July*; and that the plaintiff and defendant on receipt of the said several sums of 14*l.* 16*s.* 6*d.* and 16*s.* 6*d.* should execute general releases, the one to the other, of all demands whatsoever ("except the said tithes of calves, for which the defendant was at liberty to prosecute if he thought fit.") The replication then assigned a breach, in the nonpayment of the 14*l.* 16*s.* 6*d.* by the defendant to the plaintiff on or before the 23d of *October*.

The defendant, after protesting that it was not agreed by him &c. that the tithes of calves, or the dispute or question between him and the plaintiff relating thereto, should be excepted out of the award, demurred generally to the replication. And the plaintiff joined in demurrer.

After argument by *Burnett* Serjt. in support of the demurrer and *Agar* Serjt. contra on the 20th of *June* 1740, the opinion of the Court (except that of Mr. J. *Fortescue* A. who was absent, and who doubted,) was now given to the following effect by

Willes, Lord Chief Justice. There is but one question in this case whether the award be good or not. And only one ob-

1741.
BRADFORD
against
BRYAN.

jection has been taken to it, that though every thing was submitted to arbitration, yet that the award does not determine all matters in dispute between the parties, because the tithes of calves are excepted, and the defendant is at liberty to go to law for them if he thinks fit.

The rule is that where all matters are submitted and the submission is conditional, all matters must be determined, otherwise the award is void, and it cannot be good in part and bad in part; as where all matters are submitted, and the words *so as* or *so that the award be made of the premises on (a) or before such a day*. It was so holden in *Cro. Eliz.* 838, 9. *Risden v. Inglet*; *Cro. Jac.* 200. *Middleton v. Weeks*. It is only said there that the arbitrators need make an award only of such matters in dispute of which they had notice (b): but that distinction will not help the present case. *Ormelade v. Coke*, *Cro. Jac.* 355; *Cockson v. Ogle*, 1 *Lutw.* 550, 554.; and in many other books: and it is now settled law. In *Cro. Eliz.* it is said that the words, *so as the same award be made*, without *de præmissis*; and in 1 *Lutw.* *so as the said award be made*; the very same words as here. And I am willing to carry it as far as it has been carried already, because were it not for the cases I should be of opinion that when all matters are submitted, though without such condition, all matters must be determined; because it was plainly not the intent of the parties that some matters only should be determined, and that they should be left at liberty to go to law for

(a) The submission to an award was on condition that the award was made *on or before* the first day of *Michaelmas* term; the time was afterwards enlarged *till* the first day of *Hilary* term; the award was made *on* the first day of *Hilary* term, and held good, the word "*till*" being for that purpose inclusive. *Knox v. Simmonds*, 3 *Bro. Ch. Cas.* 358.—But no action can be maintained on an arbitration-bond, if the award be made after the time limited in the bond though within the time afterwards enlarged by the consent of both parties. *Brown v. Goodman*, *E. 29 Geo. 3. B. R.* referred to in 3 *Durnf. & East* 592. *n. b.*

(b) And therefore an award, made upon a reference of "all matters in difference between the parties," does not preclude one of the parties from suing upon a cause of action subsisting at the time of the reference, if such matter were not laid before the arbitrator. *Ravee v. Farmer*, 4 *D. & E.* 146; and *Golightly v. Jellicoe*, there referred to—If an arbitrator, under a general reference of "all actions, controversies, and suits," recite in his award only one suit between the parties, and determine that one, the award is good, because it will not be intended that there was any other. *Hawkins v. Colclough*, 1 *Burr.* 277.

the

the rest. Here the tithes of calves are excepted in the award, and therefore the award is void.

Judgment for the defendant.

1741.

BRADFORD
against
BRYAN.

MERITON *against* STEVENS.

M. 15 Geo. 2.
Tuesday,
Nov. 10th.

"SKINNER Serjt. and Draper Serjt. shewed cause against a rule nisi for setting aside a fieri facias taken out upon a final judgment, after interlocutory judgment and a writ of inquiry executed.

A writ of error is not a supersedeas till allowance or notice of it. — And if the sheriff has levied under a fi. fa. after the issuing, but before the allowance, of a writ of error, he must proceed to sell the goods.

Barnes 205.
S. C.

The case was thus; A writ of error upon this judgment was sealed before twelve o'clock in the morning, afterwards a fieri facias was sued out and executed by the sheriff about five o'clock in the afternoon. The writ of error was brought to the clerk of the errors and allowed about eight o'clock in the evening, and about the same time notice thereof was given to the plaintiff or his attorney.

They cited a case in 1 *Salk.* 321., in which it is said that a writ of error is a supersedeas only from the time of the allowance; and the case of *Miller v. Miller* (a) in *Michaelmas* 1727, in which (they said) it was determined that a writ of error being allowed before the execution executed the execution was irregular, but that notwithstanding even in that case the sheriff might proceed to sell the goods if taken. They relied also upon the order of this Court made *Michaelmas* 28 *Car.* 2., by which it is expressly ordered that no writ of error shall be a supersedeas until it is brought to the clerk of the errors and allowed by him. And they insisted that the reason of the thing likewise was with them; for if a writ of error were a supersedeas from the time of the sealing and before allowance or notice a defendant might keep one in his pocket until the execution was completed, the goods sold, and the money paid to the plaintiff, and then set it all aside as irregular, which would be very inconvenient and unjust.

Wynne Serjt., for making the rule absolute, insisted that the writ of error was a supersedeas from the sealing, and for that

(a) *Sir G. Co. Pract.* 39.

1741.
 MERITON
 against
 STEVENS.

purpose cited two cases in *Cro. Jac.* 342, and 535; *Godb.* 439; 1 *Ventr.* 30; 3 *Lev.* 312; 3 *Keb.* 309; and the case of *Gurnell v. Fawel* (a) *Tr.* 2 *Geo.* 2., where he said it was determined that a writ of error is a supersedeas from the time of the sealing, though there can be no contempt in the sheriff until notice. And he said that the same was agreed to be law in the case of *Smith v. Horner* (b) *M.* 4 *Geo.* 2. *B. R.* He likewise cited the case of *Spinks v. Bird* (c) in this court, *P.* 10 *Geo.* 2. But he admitted that, if the sheriff had taken the goods before the sealing of the writ, he might have proceeded to the sale of them afterwards.

Mr. J. Fortescue A. said that it was always holden to be a supersedeas from the sealing, and that it had been so frequently adjudged in *B. R.* and in this court.

Mr. J. Parker said that he believed that it had been so holden, but that he always thought that it was wrong; and that the true rule was that it should stay proceedings from the time of the allowance, but that neither the sheriff or the party should be in contempt until actual notice.

Mr. J. Burnett was of the same opinion, and said that it could not stay proceedings in this court (being a writ issuing out of another court) until it was delivered into this court or to the proper officer of it.

I was of the same opinion as my Brothers Parker and Burnett, but took time to consider of it, and to look into the cases."

(On the 28th of November this case was determined.)

"I this day, delivered the opinion of the Court (absent Mr. J. Fortescue A.) who differed from us, and adhered strenuously to the opinion that he had given before, and gave me several cases to support his opinion that a writ of error was a supersedeas from the time of the sealing; but none of his cases (except one which I shall take notice of by and by and of which I can find

(a) *Vid.* 1 *Barnard.* 176.

(b) *Ib.* 371.

(c) *Post*, note.

no report) when they came to be looked into at all warranted this notion. I therefore gave our opinions in the following manner—

1741.

MERITON
against
STEVENS.

Upon the case as before stated two questions arise;

First, From what time a writ of error is a supersedeas; whether from the time of sealing or only from the time of its allowance;

Secondly, How far an execution taken out regularly before a writ of error allowed shall be stayed by a writ of error allowed afterwards.

If a writ of error be a supersedeas from the time of the sealing, then the second question will not arise in the present case, because it is admitted that the writ of error was sealed before the execution was taken out, though not allowed till afterwards. But if we should be of opinion (as we are) that a writ of error is not a supersedeas until it is brought to the clerk of the errors and allowed, then the second question will arise.

As to the first question; I have looked into all the cases that were cited to support the notion that a writ of error is a supersedeas from the time of the sealing, and am very glad to find that they do not at all support it; because I think that it is a most absurd notion, and might be attended with great inconveniences. Nor do I see how the hands of this Court can be tied up by a writ or commission issuing out of another court until it is actually notified to the Court by delivering it to the Chief Justice or his clerk of the errors according to the practice of the Court.

All the cases cited before the 21 Car. 2. are either no authorities at all to support this notion, or express authorities against it. And the only two that I can find for it are both in the same year, viz. 21 Car. 2., when Keeling Chief Justice sat in that court, and are expressly contradicted by two cases in the same court 25 and 26 Car. 2. And these cases seem to have been the occasion of the two orders in this court (and which I shall mention at large by and by) made 28 Car. 2. to prevent this mistake so recently crept in from proceeding any farther.

1741.

MERITON
against
STEVENS.

The two first cases which were cited in the case of *Spinks v. Bird* in this court (and which case I shall take notice of when I come to it in order of time) were a case *M. 20 Hen. 6. 4.*, and another *H. 2 Hen. 7. 12. pl. 13*; in neither of which is there one word to the point for which they were cited: but it was only determined in both of them that when a man is taken up by a *capias* before a writ of error, it shall not be a *superfedeas*, for it comes too late after the judgment is completely executed.

The first case cited upon the present motion was the case of *Sir Christopher Heydon v. Sir Roger Godsalve*, *Cro. Jac. 342. P. 12 Jac. B. R.*, where it was holden by all the Judges (except *Coke*) that a writ of error was a *superfedeas* in itself, but it was not said from what time it was so, nor was that at all the point in question. But the question there only was whether a writ of error in parliament superseded an execution on a judgment given in *B. R.* on a writ of error out of *B. C.* after the party had had a former *superfedeas* on his writ of error out of *B. R.* Two reasons were alleged against it; one, because a man shall not have two *superfedeas*'s, which are two dilatories; and this notion was founded on what is said in some of the Year-Books: the other was, because the record was not removed out of *B. R.*, but only the transcript of it sent to the House of Lords: but both these were over-ruled, and then follows the saying which I have before mentioned.

It was the same point in effect that was in question in the *Bishop of Ossory's case*, *Cro. Jac. 534, 35. P. 17 Jac. 1. B. R.*; where it was likewise holden that a writ of error was in judgment of law a *superfedeas*, but not a word was said from what time it was so; nor could that come in question there, because it is stated in the case that the writ there was delivered to the Chief Justice in Ireland before the execution was sued out: but the only question there was pretty much the same as in the former case, whether a writ of error out of *B. R.* in *England* superseded an execution in *Ireland*, because the record is not removed hither, but only a transcript sent over.

The case of the *Earl of Pembroke v. Boslock* in *Godb. 439. T. 5 Car. 1. B. R.* was thus; judgment in *quare impedit*, and the
same

same term a writ of error is delivered to the same court before a writ to the Bishop; held by the whole Court that the writ of error ought to be allowed without any other supersedeas, because it is a supersedeas in itself. So this likewise is no authority for the purpose for which it was cited, because it is said that the writ was delivered to the Court before any writ to the Bishop.

1741.

MERITON
against
STEVENS.

In the case of *Mercer v. Rule*, Sty. 159. it was only holden that after a writ of error received and allowed the hands of the Court are foreclosed, so that an execution taken out afterwards is irregular. And in 2 Rol. Abr. 492. (a) it is said that a writ of error *when allowed* is a supersedeas in law, but the party is not guilty of a contempt until actual notice (b). The most therefore that is said in any of these cases is that a writ of error is *a supersedeas from the allowance*.

The first case that I can find, where it is said that a writ of error is a supersedeas from the sealing of it is the case of Sir Robert Cotton v. Daintry, B. R. P. 21 Car. 2. 1 Ventr. 30. The writ there is said to have been sealed an hour before execution sued out, and held that a writ of error immediately on the sealing forecloses the court; so ordered the money to be brought into court, but said that the sheriff is not in contempt until notice. But this case seems to contradict itself; for if a writ of error be a supersedeas from the sealing, the execution erroneè emanavit, and so the money ought to have been returned to the defendant, and not brought into court.

There is another case reported in the same year in the same court, which is the case of *Hughes v. Underwood*, M. 21 Car. 2., reported in 1 Mod. 28., where it is said by Keeling Chief Justice that the very sealing of a writ of error is a supersedeas to the execution, and that it was a supersedeas in that case, though the writ of error was defective and erroneous, and though the record is not removed thereby.

These are the only two cases that I can find where this doctrine is laid down, and both of them when Keeling Chief Justice pre-

(a) D. pl. 7.

(b) *Capron v. Archer*, 1 Burr. 340, and *Jaques v. Nixon*, 1 D. & E. 279. S. P.

See also *Lane v. Bacchus*, 2 D. & E. 44.

1741.
 MERITON
 against
 STEVENS.

sided in the court of *B. R.*, and not long before the law was holden to be otherwise in that very court. For in the case of *Baker v. Bulstrode*, 1 *Ventr.* 255. *H.* 25 & 26 *Car.* 2. *B. R.* it was held that if the plaintiff in error do not shew the writ to the other party, or get it allowed by the clerk by indorsing recipitur on it within four days, (which time is allowed by the Court as a convenient time for putting in bail) a writ of error is no supersedeas. And the case of *Agers v. Lenthall*, in 3 *Keb.* 308, 9. *P.* 26 *Car.* 2. is a case to the same purpose; for it is there said that a writ of error before allowance or shewing it to the Court is no supersedeas. And there is another case in 3 *Keb.* 191. exactly to the same effect.

In 1 *Mod.* 112. *P.* 26 *Car.* 2. *B. R.*, it is said by *Hale* that formerly if execution were gone before a writ of error delivered or shewn to the party, it was not a supersedeas. And *Wild* said that a man must not keep the writ in his pocket, and think that this will serve. At another day *Hale* said it shall not be a supersedeas unless shewn to the party, and he must not foreflow the time of having it allowed; for if it be not allowed within four days, it is no supersedeas; and he said that a writ of error taken out, if it be not shewn to the clerk of the other side nor allowed by the Court, is no supersedeas to the execution.

And in order to prevent this notion, that a writ of error was a supersedeas from the time of its sealing, from proceeding any farther, and to establish the law in this respect, there were two rules made in the court of *B. C.* very soon afterwards, and which remain unaltered to this day. The first was made in *T.* 28 *Car.* 2., and is signed by Lord Chief Justice *North* only, in which there are these words "That all attornies do forthwith bring their writs of error, by them sued out, to the clerk of the errors to be allowed according to the ancient practice of the Court, or in default thereof the plaintiff's attorney in the action is and may be at liberty to proceed to execution." The other was made by the whole Court, *M.* 28 *Car.* 2., and is thus, "ordinatum est quod omnia brevia de errore indilate deliberentur clerico errorum pro tempore existente; quodque nemo tenebitur abstinere à prosecutione executionis pretextu alicujus brevis de errore

errore priusquam prædictum breve deliberatur clerico errorum &c."

1741.

MERITON
against
STEVENS.

Since the making of these rules I cannot find one case in the books where the former error has been revived, though the notion has (I believe) prevailed again of late in both courts without the least foundation either from reason or authority. I could cite a multitude of cases to establish the rule that I contend for, but I shall only mention some few.

In the case of *Smith v. Cave*, 3 Lev. 312. H. 2 W. & M. B. C. it was holden that by taking out a writ of error, *allowing it*, and giving bail, the hands of the Court were tied up; for in that case the writ had been allowed and bail put in before the execution in ejectment; and for that reason the execution was set aside and restitution awarded, but no costs were given, because it was said that the plaintiff was not in contempt until actual notice.

In the case of *Perkins v. Woollaston*, Salk. 321. P. 3 An. B. R. it was said that a writ of error is a *superfedeas* from the time of the allowance, and that is notice of itself; but if the defendant has notice before the allowance, it is a *superfedeas* from the time of the notice. The same case is reported in 6 Mod. 130.: and it is there said by the Court that the opinion in some books was that a writ of error was a *superfedeas* to avoid the execution from the sealing thereof though not to punish the officer till a *superfedeas* comes, and that Rolle was of this opinion, but that the law is now taken that it is not a *superfedeas* till notice to the plaintiff's attorney, and that the allowance thereof is sufficient notice; and they held that, if execution be executed before notice of a writ of error, the return or perfection thereof may be afterwards.

The case of *Moorfoot v. Chivers*, T. 11 Geo. 1. B. R. is to the same purpose, and is reported in a book called *Modern Cases in Law and Equity* (a), printed by Osborn, fo. 373. There on a motion to set aside an execution as being executed after a writ of error, the case was thus; the writ of error was allowed about

(a) 8 Mod. 373; and 1 Str. 632. S. C.

1741.
 MERITOR
 against
 STEVENS.

two in the afternoon, and about the same time the execution was served; it was insisted on the one side that the hands of the Court were tied up from the allowance, on the other that it must be from the notice of the allowance; and they held that if the plaintiff in error could shew that the writ was sued out *and allowed* before the execution taken out, it must be set aside, though the defendant in error had no notice of it.

I shall mention no more cases, though I could cite many to the same purpose, because (as I said) I can meet with no cases to the contrary in the books since the 26 Car. 2.

My Brother Fortescue A. indeed mentioned one anonymous case to me which (he says) was determined in B. R. M. 1 & 2 Anne; in which (as he reported it to me) it was said by Holt that a writ of error is a supersedeas, though not allowed; the party indeed shall not be in contempt without notice, but the mere taking out of a writ of error is a supersedeas, so that if execution be taken out after a writ of error is taken out it shall be set aside; and this has always been the distinction. But as I cannot find this case in any of the books, and as it is contrary to the reason of the thing and so many cases, some of them contemporary with this, I do not give any credit to this report, nor can I believe that so great a man as Holt would say that this has always been the distinction, when he must know that the distinction had always been otherwise, except in the two cases before mentioned.

The case of *Spinks v. Bird*, which came on before this Court P. 10 Geo. 2. (a) was not directly to this point, but was on an exigent

(a) The following short note (1) of that case, which appears to have been taken in court, is copied from another of Lord Chief Justice Willes's MSS. May 14th, 1737. "*Spinks v. Bird*. Question whether a supersedeas or a writ of error will supersede an exigent taken out on a *capias ad satisfaciendum*.

Parker Serjt. for the defendant. Error before the exigent, but allowed afterwards. Error teste'd 5th February; exigent 7th; allowance 8th. That writs of error supersede process. 2 Hen. 7. fo. 12. pl. 13. A person being taken in execution before, the error did not supersede it. But, if before execution, held *per Curiam* that it supersedes

(1) See also *Barnes* 4to. 434.

exigent taken out after a writ of error sealed, and we stayed proceedings upon it for that reason: and I own that, being then just come into the court, and it being positively averred by my Brothers *Denton* and *Fortescue* that it was an established rule that a writ of error was a superseas from the time of the sealing, I then came into their opinion without further inquiring into it. But upon looking into the cases there cited, and finding that none of them, except those two before mentioned, warranted this opinion, and being satisfied that it is without the least foundation, I do not consider myself bound by an opinion which I then rather came into than gave.

1741.
MERITON
against
STEVENS.

There is but one thing more that it is necessary to take notice of upon this head, which is that it was said that this writ is to be considered as a commission, and that therefore it is a superseas from the time of the sealing, as determining the jurisdiction of this Court from the time of the sealing, and giving it to the Court of *B. R.* But this notion, when considered, will be found to have as little in it as the other. For in respect to commissions, it is expressly said by Lord Chief Justice *Hale*, in his *Pleas of the Crown*, that a new commission of oyer and terminer does not supersede the former commission until notice, either by shewing the new commission, by proclamation in the country, or by holding a session under the new commission. And in his *History of the Pleas of the Crown*, vol. 2. fo. 25, there are these words "A new commission determines the old one by notice

superseas it. *Latch* 57. 1 *Ventr.* 255. Writ of error a superseas from taking it out: but the party not in contempt till notice. 1 *Godb.* 439. *Rast. Entr.* 309. b. pl. 7. an express authority. The form of all superseas's is that, if the sheriff has not executed the judgment before the receipt of the superseas, the sheriff shall cause all process, exigent &c, to stay. *Off. Brev.* 378. *Thef. Brev.* 293. *Clift's Entr.* 693, 694. The reason is, that it is in suspense whether judgment right or not. 2 *Cro.* 342, 535. Writ of exigent in this case for a satisfaction, and not for appearance. Said that an outlawry is not considered as an execution; answer, it does

not become the King's process till after the outlawry: but then it is the King's proceeding, so not within the statute.

Chapple Serjt. admits that a writ of error stays execution, but insists this is not part of the execution though in order to it. Writs of error formerly pleaded in abatement or bar: but now the course otherwise, that the party shall proceed to judgment but not to execution. 8 *Co.* 143. *Dr. Drury's case*; 1 *Rel. Abr.* 777. Admits the precedents are that they shall not proceed to outlawry after error.

Per Curiam. The rule for discharging the superseas, so far as it relates to the exigent, discharged."

thereof

1741.
 MERITON
 against
 STEVENS.

thereof and shewing it to the new commissioners as to all those and those only to whom it is shewn."

Whether therefore a writ of error be considered as a writ, or a commission, we are all clearly of opinion, as to the first point, that it is no superseas till shewn to the Court, or allowed by the proper officer; and that therefore in the present case the fieri facias was well sued out, and (so far as the sheriff has gone) well executed.

This being our opinion on this point, it becomes necessary to consider the second question, how far an execution taken out regularly before a writ of error allowed shall be stayed by a writ of error allowed afterwards. If it were a capias, that being a complete execution, it has been holden that a writ of error comes too late afterwards, for that the judgment is completely executed, and therefore the party shall remain in prison notwithstanding the writ of error. And so it was held in *M. 20 H. 6. 4.* and *H. 2 Hen. 7. 12. pl. 13.* as I have taken notice before. But *24.* how far this is reasonable since the statute *3 Jac. 1. c. 8.* and *16 & 17 Car. 2. c. 8.*, in such cases where bail is actually put in to answer the debt or damages and costs pursuant to the direction of those statutes.

In *Cro. Eliz. 597.* the case of *Charter v. Puter, H. 40 Eliz. B. R.* was thus; a fieri facias was awarded, by virtue whereof the sheriff took the defendant's goods, and before sale the record was removed into the Exchequer-Chamber by writ of error, and a superseas awarded; the sheriff returned a seizure of the goods, and that they remained in his hands *pro defectu emptorum*; a restitution was prayed, but denied; and it was holden *per totam Curiam* that as the sheriff had begun (a) the execution regularly he must complete it as far as he had gone; and a *venditioni exponas* was awarded to perfect it. It is there said that it was so held in the case of *Sir Miles Corbet v. Rookwood, T. 39 Eliz. B. R.*, though the record was removed by a writ of error. And in *Dy. 98. a. 99. b. p. 1. M.* there is a case exactly to the same purpose.

(a) See also *Cooper v. Chitty, 1 Black. Rep. 69;* and *Rorke v. Dayrell, 4 Durnf. & E. 411, 412.*

In *Moor* 542. *H. 40 Eliz. B. R.* if the sheriff take goods in execution on a *fi. fa.*, and has them in his hands not sold, and then a supersedeas comes to the sheriff, yet he shall not deliver the goods but shall proceed to the sale of them, because the beginning of the execution was before the supersedeas delivered, and the execution being entire shall not be divided.

1741.

MERITON
against
STEVENS.

In *Yelv.* 6. *Tocock v. Honyman, Tr. 44 Eliz. B. R.* a writ of error and supersedeas to the sheriff after a *fieri facias*, he shall proceed to the sale of the goods which he has before the supersedeas, but shall levy no more; per totam curiam. In *1 Ventr.* 255. in the case of *Baker v. Bulstrode* before cited it was held that if before the writ of error the sheriff returns *fieri feci et non inveni emptores*, the execution is not to be undone. And in *1 Salk.* 322, 323. in the case of *Glerk v. Withers* it is said that the execution is one entire thing, and is not to be superseded after it is begun.

The only case to the contrary is in *2 Rol. Abr.* 491. (a), where it was said that if the supersedeas comes before sale, the goods shall not be sold, because (as it is said there) the property is not altered by the sale (b); which reason not being a true one, I give no credit to this case.

The case of *Dr. Drury* in *8 Co.* 143. a., though not directly to this point, may not be improper to be mentioned on this occasion as it may tend to illustrate the matter. It is there said that if an erroneous judgment be given, and the sheriff by virtue of a *fieri facias* sell a term, and afterwards the judgment is reversed, the sale is good and only the money is to be restored, because the sheriff was compelled to sell; otherwise in the case of an outlawry, where he is not compelled to sell, but the term is only to be taken into the King's hands *ut de vero valore &c.*; for there if the outlawry be reversed, the party shall be restored to his goods.

The form of a supersedeas for this purpose, as it is in *Officina Brevium* 378. is thus, "That if the judgment be not executed before the receipt of the supersedeas, the sheriff is to stay from

(a) *D. pl.* 5.(b) Seizure. *Vid. 2 Rol. Abr.* 491.

1741.
MERITON
against
STAVENS.

executing any process of execution until the writ of error is determined." From whence it likewise appears that if the execution be begun before a writ of error or supersedeas delivered, the sheriff ought to proceed to complete the execution so far as he has gone, but not to proceed any farther.

From these authorities and the reason of the case we are of opinion in the present case that the sheriff ought to proceed to the sale of the goods which he hath already levied, and to return the money into Court to abide the event of the writ of error.

And we made a rule accordingly."

M. 15 G. 2.
Thursday,
Nov. 12th.

THOMAS REIGNOLDS *against* SIMON EDWARDS Clerk
and WILLIAM DILLOW.

A., the owner of a close situate within a close belonging to B., had a prescriptive right of way through B.'s to his own: twenty-four years ago B. stopped up the old way, and made a new way which was used ever since but lately B. stopped up the new way; — in an action brought by B. against A. for going over the new way, it was holden that A. could not justify using this way as a way of necessity, but that he should either have gone the old way and thrown down the inclosure, or brought an action against B. for stopping up the old way.

"TRESPASS, for that the defendants on the 1st of May 1739 and at divers times between that day and the 1st of October 1740 broke and entered the plaintiff's closes called *Limepit's bole* and *Upper Field* in the parish of *Tugford* in *Shropshire*, and trod down and consumed his grafs and corn there growing with their feet by walking, and other grafs and corn ate up trod down and consumed with cattle, and his soil with the wheels of carts wagons and other carriages subverted, and his hedges gates and fences there then erected and standing broke cut in pieces and threw down &c. Damage 1000*l*.

The defendants to all the trespasses (except breaking the said closes and treading down and consuming the grafs there growing with their feet and eating up &c the same with cattle, and subverting the soil with the wheels of carts &c, and breaking &c one of the said gates) plead not guilty; and thereupon an issue is joined.

And as to these trespasses they plead specially that the said two closes of the said plaintiff and one acre of land parcel of

— The new way was only a way by sufferance during the pleasure of both parties; and A. by stopping it up determined his pleasure.

the

the rectory of *Tugford* aforesaid, which at the time when &c and long before was and still is in the occupation of the defendant *Edwards*, time out of mind until about twenty-six years ago were the several parts of a certain common field called the *Upper Field* in the said parish, several parts of which did belong to divers persons as tenants and owners thereof about twenty-six years last past when the said plaintiff became tenant and owner of all the said field, except the said acre parcel of the said rectory, which said field for all the time aforesaid until the plaintiff became owner thereof lay open and uninclosed; and further plead that the said acre is and time out of mind was parcel of the said rectory; that *Thomas Knight* clerk long before the time when &c was and still is rector of the church of *Tugford*, and was seised of the said acre with the appurtenances in his demesne as of fee in the right of his church; and that all the rectors of the said church time out of mind until the inclosure of the said field by the said plaintiff had and were accustomed to have for themselves their farmers and tenants of the said acre a certain way from the King's highway in *Tugford* into and through a certain lane there called *Colley Meadow Lane*, and from thence into through and over that part of the said field which lay next unto the said acre of land unto the said acre of land, and from thence back again to the said highway, to go return and pass and to drive their cattle, waggons, carts, carriages &c, every year at all times of the year at their will and pleasure, for the convenient tillage and necessary occupation &c of the said acre of land; and further plead that about twenty-six years ago the plaintiff became tenant and owner of all the said common field, except the said acre, and that shortly after viz. about twenty-four years ago he inclosed the said field with hedges &c and stopped up the said way, and hath kept the same stopped up ever since, and that before the said inclosure the said field lay open on the north side thereof contiguous to the King's highway leading from *Prior's Ditton* to *Tugford*, commonly called *Bridgnorth Road*, and that the plaintiff soon after the said inclosure made a gateway or passage from the said highway into the said field at or near to a place called *Limepit's hole* and set up a gate there for a way as well for the plaintiff to go return and pass and drive his cattle waggons carts carriages &c backwards and forwards from the said highway into that part of the said field called

Limepit's

1741.

REIGNOLDS
against
EDWARDS.

1741.

REIGNOLDS
against
EDWARDS.

Limepit's-hole and from thence into another part called the *Upper Field*, and from thence back again to the said highway, as for a way for the tenants and occupiers of the said acre of land to go return and pass &c from the said highway into through and over the said other part of the said field called the *Upper Field* to and into the said acre, and from thence back again to the said highway &c. And they further plead that the way into the said acre at the time when &c and at the several times in the declaration mentioned from the time of inclosing the said field was in and through the said gateway to go return pass &c, which said way the said *Knight* and all the rectors of the church aforesaid and their tenants and farmers of the said acre have had and used and of necessity ought to have use and enjoy for the tillage &c of the said acre; and further say that there is not nor at the time aforesaid nor at any time since the said inclosure was there *any other way or passage left open* to the said acre but in and through the said way into the said close called *Limepit's hole* &c. And they further plead that the said *Knight* being so seised before the time when &c viz. on the 12th of *April* 1737 demised to the defendant *Edwards* (inter alia) the said acre of land, to hold from the 25th of *March* then last past for one year and so from year to year as long as both parties pleased; that by virtue thereof the defendant *Edwards* entered into the said acre, and was and still is possessed thereof; and the other defendant justifies as servant of the said *Edwards* and by his command going with cattle carts and carriages &c in the said way through and over the closes in the declaration mentioned, using the said new way; and because the said gate set up in the said new way at the time when &c and at the days and times in the declaration mentioned was locked up and chained with a lock and chain, the said defendant *Edwards* and the other defendant by his command at the time when &c and at the divers other times &c did necessarily a little break and cut the said gate, and did throw down the same in order to have *their necessary passage there* with the cattle waggons &c of the said *Edwards*, and did with their feet and cattle tread down and consume a little of the grass growing there, and the said cattle did by snatches and morsels against the will of the said defendants bite and eat a little of the grass growing in the said closes in the said way and on the sides of the same, and the defendants did a little subvert

the

the soil there in the same way with the wheels of the waggons &c, doing as little damage as they could, which is the same trespass &c; and this they are ready to verify, and pray judgment &c.

1741.
REIGNOLDS
against
EDWARDS.

To this special plea the plaintiff demurs generally, and the defendants join in demurrer.

Belfield Serjt. for the plaintiff, and *Bootle* Serjt. for the defendants.

The objections to the plea were that the defendants have set forth a prescriptive right to the old way, which right still remains notwithstanding the inclosure; that as there is no grant set forth of the new way the defendant's right to that is only by sufferance; that it was merely a right at the will of both parties; and that the plaintiff might determine his will whenever he pleased, and then the defendant would have a right to throw down the inclosure and go the old way again, or bring an action for the obstruction; or that the defendant might determine the right whenever he pleased by refusing to accept of the new way any longer, and insisting on his right to the old way; that the plaintiff in this case had determined the right to the new way by locking up the gate; and that therefore in this case the defendants ought not to have broken down the gate, but to have insisted on their old prescriptive right.

To these objections it was answered by *Bootle* that this way being laid out by the plaintiff himself on his stopping up the old way, which he had no right to do, and it having been enjoyed by the plaintiff's consent for so many years together by the occupiers of the one acre, it gave them a right to this new way; or at least that the plaintiff should not be allowed to take advantage of his own wrong; for what the defendants had done they were compelled to do by the plaintiff's wrongfully stopping up the old way. And he insisted very much on the necessity of the case, it being alleged in the plea that the defendants were necessarily obliged to go this way to their close, there being no other way, which was confessed by the demurrer. And as every man must have a way to his land, necessity may give a right. And he said that if the defendant had brought his action

1741.
 REIGNOLDS
 against
 EDWARDS.

for obstructing the old way, he would have recovered but very little damage, when it had appeared in evidence that the plaintiff had left out a good new way for him, and which had been acquiesced in for so many years. And he cited the case of *Horne v. Widlake*, *Yelv.* 141. (a), which was thus; trespass for breaking and entering the plaintiff's close and spoiling his grass; the defendant pleads that in the close where &c there had been time out of mind a foot-way for all his Majesty's subjects in through and over the said close to such a place, and that the plaintiff on such a day before the trespass ploughed up the foot-way and sowed it with corn and laid thorns at the side, and near the said foot-way in the said close left and assigned another foot-way for all his Majesty's subjects, which way so laid forth had been used for all foot passengers; and that the defendant at the time when &c went in the said foot-way &c doing as little damage as he could, which is the same trespass &c, and demands judgment; the plaintiff demurred; and it was adjudged against him, for the plea of the defendant is a good excuse for the trespass, because the plaintiff was the first wrong-doer, and also because he laid out this new way, and so shall not sue the defendant contrary to his own agreement; as if there be a foot-way under the hedge in the close of J. S., and he removes the hedge further into the close, if passengers using their way go as near to the hedge where it is newly placed, they shall not be sued for it, for the injury (if any) arises from the act and tort of the plaintiff, and *volenti non fit injuria*. And a case was cited 8 *Ed.* 4. 5. a. if water runs through the land of M., and he stops the water in his own close so that it surrounds my land, I may enter into his close to remove the obstruction, and he shall not maintain an action. The same law in the principal case; *per totam Curiam*, except *Yelverton*. And *Bootle* argued further that, if this defence were not good, a man might lose his ancient way, and so have no way at all; for after an acquiescence for a great number of years (and it will be the same after sixty as after twenty-six) if a plaintiff might stop up the new way, the defendant by reason of the death of the witnesses or for want of other evidence after so long a time

(a) 1 *Brownl. and Gouldst.* 212. S. C. Et vid. *Horn v. Taylor*, *Noy* 128.

might not be able to make out his prescriptive right to the old way.

1741.

REIGNOLDS
against
EDWARDS.

But per Curiam (J. Fortescue absent) the plea of the defendants is not good.

A man can have a right to a way only by prescription, grant, or necessity; and I much doubted whether a man can have such a right by necessity (a) only, though it is a strong evidence of a right. Now it is not pretended that the defendant has a right to this new way either by grant or prescription. Nor has he a right by necessity, if that would give a right; for though it is said that he has pleaded this and that it is confessed by the demurrer, it is not so; for nothing is confessed but what is well pleaded. And as another way is set forth in the plea, to which he has a right by prescription, this part of the plea that he has no other way is repugnant to the other part of the plea, and therefore void. Besides the defendants have not pleaded that there is no other way, but only that there was *not any other way or passage then left open*. This new way therefore was only a way by sufferance, and either party might determine it at his pleasure; and the plaintiff in this case has determined his will by fastening the gate, and so the defendant ought to have had recourse to his old way.

This is not like the case in *Yelverton*, for there the new way lay open at the time of the trespass, and so long as the way lies open the right continues. As to what was said that a man by this contrivance after a length of time may lose his prescriptive right; if he do, it is his own fault by accepting a new way without a grant (b) to confirm it. Besides here no such inconvenience will ever happen, because the defendant's prescriptive right is admitted on the record, which will be for ever hereafter

(a) This expression must be taken with reference to this particular case. For in *Chichester v. Lethbridge*, *sup.* 71. the Lord Chief Justice and the whole Court admitted that there might be a way of necessity; and a dictum, that there cannot be a way of necessity, would be contrary to all the authorities on this subject both

ancient and modern. See the cases referred to in *Chichester v. Lethbridge*, *sup.* 72.

(b) But under circumstances the grant of a new right of way may be presumed. Vid. *Keymer v. Summers*, *Bull. N. P.* 74, and *Read v. Brookman*, *per Lord Kenyon* Chief Justice, 3 *D. & E.* 157.

evidence

1741.

REIGNOLDS
against
EDWARDS.

evidence against the plaintiff and all claiming under him. And as to what was said that if the defendant in this cause had brought his action, he would have recovered very little damages, it is a mistake; he would indeed have recovered very little damages, if he had brought his action whilst the new way was left open: but if he had brought his action in the present case after the plaintiff had stopped up the new way, he would probably have recovered very considerable damages.

So judgment was given for the plaintiff."

M. 15 Geo. 2.
Friday,
Nov. 13th.

LONGMORE *against* ROGERS (a).

A defendant, who prays oyer of a deed, is entitled to a copy of the attestation and of the names of the witnesses, as well as of every other part of the deed.

"A RULE had been made in my absence on the motion (b) of Serjt. Wynne for setting aside a judgment by reason that the plaintiff had not given the defendant a right (c) oyer of the bond and condition. The objection (which was verified by affidavit) was that the plaintiff did not give him a copy of the attestation and the witnesses' names, nor of some memorandum or subscription that was written at the bottom of the bond, but refused so to do.

(a) In *Barnes* 263, by the name of *Longman v. Rogers*.

(b) "M. It appeared in this case that the attorney for the defendant was now in the prison of the Fleet at the time of giving notice of this motion; and the plaintiff insisted on the stat. 12 Geo. 2. c. 13. s. 9. that an attorney when in prison could not act as such, but ought to be struck off the roll: but upon looking into the statute, it is so expressed that it only extends to attorneys for plaintiffs (1). Besides it is said there that if they had begun to be attorneys in a cause before they were in prison, they might go on afterwards to act in the cause though they were in prison. And it did not appear in the present case that the attorney was in prison when he first became attorney for the defendant." MS. Willes

Lord Chief Justice.

(c) If the defendant, after praying oyer of a deed, do not set out the whole of it, the plaintiff may sign judgment as for want of a plea, or the Court on motion will quash the plea. *Wallace v. The Duchess of Cumberland*, 4 Durnf. & East 370—So if the defendant set out a false oyer, the Court will order the plea to be struck out, and give judgment for the plaintiff. *Ferguson Bart. v. Mackreth*, Hil. 24 Geo. 3. B. R. cit. *ib.* in note.—And if the defendant, after craving oyer of a deed, (of which profert is made in the declaration,) do not set it out in his plea, the plaintiff in delivering the issue may set it forth as part of the declaration. *The Weavers' Company v. Weare*, M. 18 Geo. 2. C. B. MS. Willes Chief Justice; and *Barnes*, 327.

(1) And an attorney, in prison, may sue for himself. *Kage one &c v. Denew*, 7 Durnf. & East 671.

Skinner Serjt. now shewed cause against the rule, and insisted that by the course of the Court it was not necessary for a plaintiff to give a copy of more than the plaintiff had done in the present case. That the meaning of oyer was only to enable the defendant to plead, for which purpose only the bond and condition were necessary to be set forth, and that the names of the witnesses were in nowise material. And that it was sworn in an affidavit (which he produced) that the memorandum was written after the execution of the bond, and not at all material, as appeared by the bond itself which he also produced in court.

1741.
LONGMORE
against
ROGERS.

The officers of the court said that a copy of the witnesses' names had been seldom or never given, because seldom desired, but whether necessary or not, if required, they doubted.

Wynne Serjt. insisted that it was necessary, if required; and that it might be as necessary to inform the defendant what to plead as the condition. For he might forget at a great distance of time whether he had executed the bond or not, and might be reminded of it by seeing the witnesses' names, or might have recourse to them to inquire whether he executed it or not. And that the memorandum might amount to a condition. And that the plaintiff was not to judge for the defendant whether material or not. And he cited the case of *Kimston v. Abell* in this court, *H. 10 Geo. 2.*, where a memorandum and indorsement were ordered to be set forth on oyer.

Mr. *J. Fortescue* was of opinion that the witnesses' names need not be set forth, nor a copy given of that part of the bond.

Mr. *J. Parker* said that, on oyer prayed, the bond and condition used to be set forth on the imparlance-roll; but that these rolls of late being seldom made up unless in particular cases, the practice for many years had been for the plaintiff to give the defendant a copy of the bond and condition. And he said that he did not remember that he had ever seen a copy of the attestation and witnesses' names set forth on the imparlance-roll. But yet he seemed to think that it was proper and necessary, if the defendant required it, for the plaintiff to give him a copy of the attestation and witnesses' names. But what chiefly weighed

1741.
LONGMORE
against
ROGERS.

with him (he said) to make the rule absolute was that the plaintiff (though desired) had not given the defendant a copy of the memorandum written at the bottom of the bond which it might be material for him to know, and the plaintiff was not to judge for himself.

Mr. J. *Burnett* said that formerly when oyer was prayed the deed was brought into court, and continued there the whole term for the defendant to inspect it as much as he pleased. And he thought that this new method, which was substituted in the room of the old one, ought to be equally beneficial to the defendant, and that therefore he ought to have a copy of every thing that was written on the bond or deed.

I was of the same opinion; and the rather because the witnesses' names and the attestation were formerly inserted in the deeds themselves, and were considered, as is said in *Co. Lit. 6. a.*, as a part of the deed, and that this practice continued until *Henry* the Eighth's time, and there said that the seal is the essential part of a deed; and likewise because I thought it might sometimes be very material for the defendant to know the witnesses' names to enable him to plead, for the reasons before mentioned.

But the practice of the Court having been of late considered to be otherwise, we did not think proper to set aside this judgment for this reason as irregular, it appearing on the bond, when produced, that the memorandum underwritten was altogether immaterial in the present case, and that it was written after the bond was executed, and was not subscribed by the parties."

(It appears however that on a subsequent day, *Tuesday, November 24th*, the question was revived, when the judgment was set aside.)

Tuesday,
Nov. 24th.

"This was the matter of the oyer which came on upon a motion on behalf of the defendant to set aside the judgment because the plaintiff on the defendant's praying oyer had not given him a copy of the attestation and witnesses' names to the bond.

My

My Brothers *Parker* and *Burnett* (absent Mr. J. *Fortescue A.*) concurred with me in opinion that the defendant was entitled to a copy of the attestation and witnesses' names, for that the defendant is entitled to oyer, not by any rule of this Court but by the law of the land which is observed in all Courts. And that therefore, as it is not in our power to deprive a defendant of the benefit of the law, if we altered the course we ought to substitute a new one in it's stead equally beneficial to a defendant as the old one, which this plainly was not, unless he had a copy of the attestation and witnesses' names; for though they could not be material as to enabling him to plead a special plea on the foot of the condition, they might be very material for him to know for several other reasons, as whether he should plead non est factum, or make any defence or not.

1741.
LONGMORE
against
ROGERS.

But being informed by the prothonotaries that this had not been taken to be the course of the Court of late, we thought it proper to make a new rule to ascertain this matter for the future; and that the most just that we could make in the present case was, to set aside the judgment without costs, and we made a rule accordingly (a)."

(a) The party, of whom oyer is demanded, is allowed two days for that purpose. *Page v. Divine*, 2 D. & E. 40.— If a deed be lost, the plaintiff may declare on the deed as lost by time or accident, without a profert. *Read v. Brookman*, 3 D. & E. 151. So he may declare that a release was cancelled by the seal of the releasor being taken off and destroyed or lost; with a profert of the residue of the deed. *Bolton v. Bishop of Carlisle*, 2 H. Bl. Rep.

259. But if he make a profert of a deed (lost) in his declaration, and the defendant demand oyer, the Court will order that a production of a copy of the deed (if any) shall be good oyer, or they will give the plaintiff leave to amend his declaration by stating that the deed is lost. *Totty v. Nesbitt*, Tr. 24 Geo. 3. B. R. cited in 3 D. & E. 153. note; and *Matison v. Atkinson*, E. 27 G. 3. B. R. ib.

SKIPP *against* HARWOOD.

"WE rejected the affirmation of a Quaker on a motion for an attachment for breach of a rule of nisi prius, afterwards made a rule of this court; though it was said by the counsel that it had been allowed to be read in the King's Bench in order to obtain a rule nisi for an attachment though refused to be read when cause was shewn, which seemed to us to be very absurd.

And

M. 15 Geo. 2.
Tuesday,
Nov. 24th.

The Court refused to receive the affirmation of a Quaker on a motion for an attachment for non-performance of an order of Court.

1741.
 SKIPP
 against
 HARWOOD.

And therefore we did not believe that the Court of King's Bench allowed it; especially since it was refused to be read in that court in the case of *Oliver v. Lawrence* (a). *H. 6 Geo. 2.*, even on a motion for an attachment for non-payment of costs, which is more in the nature of a civil (b) suit than any other attachment whatsoever. Another case was likewise cited in the King's Bench where an affirmation had been permitted to be read on a motion

(a) Since reported in 2 *Str.* 946: there the affirmation was the foundation of an intended rule to answer the matter in an affidavit.

(b) By stat. 7 and 8 *W. 3. c. 34. s. 1.* It is enacted that every Quaker, who shall be required upon any lawful occasion to take an oath in any case where by law an oath is required, shall, instead of the usual form, be permitted to make his or her solemn affirmation &c; with a proviso (sect. 6.) that no Quaker shall be permitted to give evidence in any criminal causes. That act was only to continue in force for seven years: but it was afterwards revived; and by stat. 22 *Geo. 2. c. 46. s. 36.* it is enacted that in all cases wherein an oath is allowed or required the solemn affirmation of a Quaker shall be allowed and taken instead of such oath; provided (sect. 37.) that no Quaker shall be permitted to give evidence in any criminal cases &c. On the construction of these acts of parliament it has been decided; 1st, That where the object of the prosecution is criminal, the affirmation of a Quaker cannot be received. *R. v. Wych*, 2 *Str.* 872, and 1 *Barnard*, 346, a motion for an information for a misdemeanor; *R. v. J. Gardner*, 2 *Burr.* 1117. S. P.; *Oliver v. Lawrence*, *sup.* 2 *Str.* 946, a motion to answer the matter in an affidavit; *R. v. Green*, 1 *Str.* 527, and *R. v. Gumbleton*, 2 *Atk.* 70, both applications to exhibit articles of the peace.—2dly, Even though in form it be a civil proceeding; as in an appeal of murder, *Castell v. Bambridge*, 2 *Str.* 856.—3dly, Unless the application be against a Quaker, and there his own affirmation may be received, though the proceeding be of a criminal nature. *R. v. Shacklington*, 8 *Geo. 2. B. R. Andr.* 201. n; *Hudson v. Jones*, *ib.*; *R. v. J. Gardner*, 2 *Burr.* 1117; and *Cowp.* 392.—

4thly, Where the object of the proceeding is of a civil nature, the affirmation of a Quaker may be received. *Atcheson v. Everitt*, *Cowp.* 382; an action of debt for a penalty on the bribery act. 2 *Geo. 2. c. 24*; *Powell v. Ward*, cited in *Andr.* 200; a motion for an attachment for not performing an award; *Taylor v. Scott*, cited in *Cowp.* 394; even though the proceeding be carried on in the name of the King. *R. v. Turner*, 2 *Str.* 1219. a rule to shew cause why an appointment of overseers should not be quashed.—It is true indeed that in *Robins v. Sayward*, 1 *Str.* 441. the Court of King's Bench refused to grant an attachment for non-performance of an award on the affirmation of a Quaker, because they said "It is a criminal prosecution within the proviso of the statute 7 and 8 *W. 3. c. 34.*" But as the ground on which that case was decided has since been questioned, the case itself may probably no longer be considered of any authority, especially since the cases *Powell v. Ward*, and *Taylor v. Scott*, above referred to. When the case of *Robins v. Sayward* was decided, an attachment for not performing an award was considered as a criminal proceeding: but in *R. v. Myers*, 1 *D. & E.* 266. Mr. J. Buller, (in answer to a case cited from 1 *Atk.* 58 to shew that such an attachment was of a criminal nature) said "That case might have been good law formerly; for then the Court only looked to the contempt: but it has been settled of late years that an attachment for non-performance of an award is only in the nature of a civil execution." See also on this head *J. Baker's case*, 2 *Str.* 1152, *R. v. Stokes*, *Cowp.* 136; *Bonafous v. Schole*, 4 *D. & E.* 316; *R. v. Pickerill*, *ib.* 809; and *M. Itham v. Smith*, 8 *D. & E.* 86.

for an attachment; but *Paramor* (a), who was concerned in that cause, said that it was read by consent and to prevent delay, otherwise the Court would not have admitted it."

(a) Who was one of the prothonotaries.

1741.

SKIPP
against
HARWOOD.

DOE on the Demise of THOMAS MORRIS and Others
against WILLIAM UNDERDOWN.

M. 15 G. 2.
Friday,
Nov. 27th.

THE opinion of the Court was delivered as follows by

Willes, Lord Chief Justice. "Ejectment for the third part of two messuages and several parcels of land in *Walmer Ripple* and *Great Mongebam* in *Kent*. The demise is laid on the 23d of *April* 10 *Geo. 2.* to hold for seven years from the 22d. The defendants plead not guilty; and a special verdict was found, on which it now comes before the Court.

The special verdict is to this effect; that long before the time when &c one *Richard Morris* was seised in fee of all the messuages and lands mentioned in the declaration, of which the third part is in question; and that the lands are of the tenure of gavelkind; that he by his will, 12th of *September* 1730, devised them by these words, "All and singular my messuages tenements lands hereditaments and premises whatsoever situate lying and being in the several parishes of *Ripple* and *Mongebam*, and also all those my two messuages or tenements with the lands and premises thereto belonging situate lying and being in *Walmer* now or late in the tenures of *Richard Morris* and *R. Scott*, I give devise and bequeath unto *William Underdown* of the town of *Deal* and *Anne* his wife, to hold to them for so long time and until *William Underdown* the younger *John Underdown* and *Morris Underdown* sons of the said *William Underdown* and *Anne* his wife shall come to and attain their several and respective ages of one-and-twenty years, then I give devise and bequeath

The devisor devised lands to A. till B. C. and D. attained their respective ages of twenty-one and then to B. C. and D. and their heirs equally to be divided between them as tenants in common, charged with the payment of an annuity of 10l. by B. C. and D. equally and proportionably out of their several estates; then he devised other lands to A. in fee; and then gave all the rest residue and remainder of his real and personal estate not before given to E. her heirs executors &c, and directed that his debts &c should be paid out of

the estate given to A. and E.—B. died before the devisor, but (if he had lived) would have been of age at the time of the trespass and ejectment; it was holden that the devise to B. was a lapsed devise; and that the heir at law of the devisor (not the residuary devisee) was entitled to B.'s share as not being disposed of by the will.

—A devise of lands to A. till B. attains the age of twenty-one, and then to B. in fee, gives B. a vested interest, descendible to his heirs if he die before twenty-one.

1741.

DOE dem.
MORRIS
against
UNDER-
DOWN.

the same unto the said *William Underdown* the younger the said *John Underdown* and *Morris Underdown* and to their heirs and assigns respectively, equally to be divided between them as tenants in common and not as joint-tenants, and to take and hold their respective parts and shares of and in the same as they shall severally arrive at their said ages of twenty-one years and not before, unless they the said *William Underdown* the elder and *Anne* his wife shall before that time depart this life, and that then immediately on the death of the survivor of them the said *William Underdown* the elder and *Anne* his wife I give and devise the same unto them the said *William Underdown* the younger the said *John Underdown* and *Morris Underdown* their heirs and assigns in manner as aforesaid; nevertheless charged and chargeable with the payment of 10 l. a-piece to them the said *William Underdown* the elder and *Anne* his wife during their lives and the life of the survivor by half-yearly payments free and clear from all deductions whatsoever by the said *William Underdown* the younger *John Underdown* and *Morris Underdown* and their several heirs and assigns equally and proportionably out of their several estates as they and each of them shall come to and enjoy their parts and shares therein respectively. Also I give devise and bequeath unto the said *William Underdown* the elder and *Anne* his wife all and singular those my messuages tenements lands hereditaments &c not hereinbefore given and devised situate lying and being in the parish of Walmer or elsewhere, to hold to them and their heirs for ever." And after several other devises and bequests immaterial to the point in question, then follows this devise; "All the rest residue and remainder of my goods chattels cattle flock ready money plate linen bedding and all other my estate whatsoever both real and personal not hereinbefore given and bequeathed I give and bequeath unto *Mary Underdown*, daughter of the said *William Underdown* and *Anne* his wife, her heirs executors administrators and assigns, subject nevertheless to the payment of the legacies charges and sums of money hereinafter mentioned."

Then he directs how and in what manner some of his legacies shall be paid by the said *Mary Underdown*. And then follow these words,

"And

"And further my will and mind is that as well all debts as funeral charges and probate of this my last will and testament and all other incidental charges touching the execution thereof as all other sums of money as shall be due and owing at the time of my decease shall be paid and discharged out of the estate hereinbefore given unto the said *William Underdown* the elder and *Anne* his wife and unto the said *Mary Underdown* equally between them by my executors hereinafter named." And then he makes the said *William Underdown* the elder and *Richard Underdown* of *Deal* his executors.

1741.
Doe dem.
MORRIS
against
UNDER-
DOWN.

Then the jury find that *John Underdown* died in the lifetime of the testator, and that the testator continued seised of the premises and died so seised in *March 1731*; and that *Thomas Morris*, *Thomas Morris*, *Richard Morris*, *John Morris*, and *Richard Morris*, the lessors of the plaintiff, are his cousins and coheirs according to the tenure of gavelkind; and that if *John Underdown* had been living at the time of the trespass and ejectment laid in the declaration he would have been then of the age of twenty-one years. That *William Underdown* the younger was twenty-one at that time, and is still living. And that *Morris Underdown* was under the age of twenty-one at that time, and is still living. That *William Underwood* the elder and *Anne* his wife are living; and that *Mary Underdown* the daughter and residuary legatee is also still living. The rest of the special verdict is only matter of form, in order to bring the point in question before the Court. And upon this special verdict it stands now before the Court for judgment.

There were some questions made at the bar that were so very plain and clear that we determined them on the first argument (a);

As that nothing vested in *John* who died before the deviser, and therefore nothing could descend to his heirs;

That the three sons were tenants in common, and that therefore *William* and *Morris* could take nothing by survivorship;

And that *William Underdown* and his wife at most could hold the part of *John* by virtue of the first devise to them no longer

(a) This case was argued several times.

1741.

DOE dem.
MORRIS
against
UNDER-
DOWN.

than until *John*, if he had lived, would have arrived at the age of twenty-one.

The only question therefore that remains to be determined is whether *John's* third part is to be considered as a lapsed devise, and consequently belonging to the lessors of the plaintiff, who are found to be the devisor's heirs at law, or whether it passed to either of the residuary devisees, for there are two sets of residuary devisees in the will claiming under different clauses.

The first residuary devisees are *William Underdown* and *Anne* his wife: but as the devisor gives nothing to them but such messuages tenements lands hereditaments &c in the parish of *Walmer* or *elsewhere*, not thereinbefore given and devised, and as the premises in question were before given and devised, it is plain, according to all the resolutions, that no estate or interest in these could pass by this devise.

The only question therefore that remains, and which admits of any dispute, is whether the premises in question belong to the heirs at law or to *Mary* the general residuary devisee, to whom he has given all his *estate* whatsoever both real and personal not thereinbefore given and bequeathed, which word *estate* (a) will certainly carry any interest that he had not before disposed of.

And as this question will principally depend on the intention of the testator, I think it may be determined by these three rules, which I take to be now certain and established rules for the construction of wills of this sort.

1st, That the intent of the testator ought always to take place, when it is not contrary to the rules of law.

(a) The word "estate" is alone sufficient to pass a fee; *Countess of Bridgewater v. The Duke of Bolton*, Salk. 236, and 6 Mod. 106; *Tanner v. Wise*, 3 P. Wms. 295. and Cas. temp. Talb. 283; *Ibbetson v. Beckwith*; Cas. temp. Talb. 157; *Scott v. Alberry*, Com. Rep. 337; *Bailis v. Gale*, 2 Vez. 48; *Ridout v. Pain*, 3 Atk. 486; *Macacree v. Tall*, Amb. 182;

Stiles d. Rayment v. Walford, 2 Bl. Rep. 938; *Davie v. Stevens*, Dougl. 323, oct. ed.; *Holdfast d. Cowper v. Martin*, 1 D. & E. 411; *Fletcher v. Smiton*, 2 D. & E. 656; *Doe d. Burkitt v. Chapman*, 1 H. Bl. Rep. 223.—So also is the word "estates"; *Fletcher v. Smiton*, 2 D. & E. 656, and *Tilley v. Simpson*, ib. 659. n.

2dly,

2dly, That the intent of the testator ought always to be taken as things stood at the time of making his will, and is not to be collected from subsequent accidents which the testator could not then foresee.

3dly, That when a testator in his will has given away all his estate and interest in certain lands, so that if he were to die immediately nothing remains undisposed of, he cannot intend to give any thing in these lands to his residuary devisee.

As to the first rule; as it was never controverted, and has been so long established, I shall cite no case to confirm it; but shall only say thus much upon it, that there is no rule of law that stands in the way of the lessors of the plaintiff. But there is a rule which makes greatly for them, that an heir at law shall not be disinherited unless the intent of the testator be manifest and apparent (a); and it will be very difficult to shew here that the testator's manifest intent was that his heirs should not have *John's* third part upon his dying before them, not only for the reasons which I shall hereafter mention, but likewise because if that had been his intent he might easily upon *John's* death have made a new will, and given away his part from his heirs.

As to the second rule, it is so consonant to reason and common sense that it does not want any authority to support it. If it did, I could mention several: but I think it is enough to say that there is no authority against it. I own that the authority of Lord *Talbot* in the case of *Hopkins v. Hopkins* (b), which he considered thoroughly and well, is a very great authority, and would stagger me very much if it contradicted this rule: but it does not contradict it at all. For that case was no more than this, the testator *John Hopkins* gave his estate to *Samuel Hopkins* son of his cousin *John Hopkins*, (who was his heir at law) for his life, and to his first and every other son in tail male, and in default of such issue to every other son of his cousin *John Hopkins* in tail male, and for default of such issue to the first and every other son of *Sarah* the eldest daughter of his cousin *John Hopkins* in tail male, with several remainders over, and some to

(a) See *Moore d. Fagge v. Heafeman*, Hil. 12 Geo. 2. sup. 140. and the cases there referred to.

(b) *Cas. temp. Talb.* 44; and vid. 1 *Atk.* 581.

1741.

Doz dem.
MORRIS
against
UNDER-
DOWN.

1741.

DOE dem.
MORRIS
against
UNDER-
DOWN.

persons in being. *Samuel* died before the testator without issue. His cousin *John Hopkins* had no son at the time of the testator's death, and *Sarah* was an infant and unmarried; so that if the limitation to her sons were considered as a contingent remainder it was void, and the estate would go to the next in remainder that was then in esse; and it certainly was a contingent remainder at the time of the will made, *Samuel* being then alive: but *Samuel* being dead before the testator, Lord *Talbot* held it to be an executory devise and consequently good, and that the estate in the mean time should vest in the heir at law: all therefore that he determined was that a subsequent accident might alter the operation of law, and this in order that the intent of the deviser might take effect, and this in favor of the heir at law, who otherwise would have had nothing; so this case does not at all contradict the rule which I have laid down. The case of *Ajbburnham* and *Bradshaw* (a) was cited as an authority for this rule, which was determined by all the Judges on a reference to them by the Lord *Chancellor*: but that case was determined on the particular wording of the statute 9 Geo. 2. c. 36. But so far it is an authority that the rule was agreed in that case by all the Judges, and is supported by several cases that were cited and agreed to be law on the arguing of that case.

As to the third rule; it is not only agreeable to reason and several old cases but is established by three modern cases of very great authority; I mean the cases of *Goodright v. Opie* in the court of King's Bench, the case of *Wright v. Hall*, and the case of *Ree v. Fludd*, both in this court.

The case of *Goodright v. Opie* (b) was (I believe) begun to be argued in the King's Bench M. 7 Geo. 1., and the judgment was given P. 9 Geo. 1. The case was thus; a devise of lands to four persons and their heirs, as tenants in common and not

(a) 2 Atk. 36; *Barnard. Ch. Rep.* 6; and 7 Mod. 239. There the question was whether a devise of lands to charitable uses made before the statute of mortmain, 9 Geo. 2. c. 36., were good, the deviser

not dying until after the statute took effect; and it was holden to be a good devise.

(b) 8 Mod. 123.

as joint-tenants; then the devisor gives all *other* his messuages lands tenements rents reversions and hereditaments not therein-before given or devised and all his goods and chattels and estates both real and personal of what kind or nature soever to the defendant *Opie* &c; one of the devisees died four years before the devisor; the lessor of the plaintiff was heir to the devisor. *Pratt* Chief Justice and *Powis* Justice were of opinion for the plaintiff the heir at law, and *Eyre* Justice and *Fortescue* Justice for the defendants the residuary devisees. It was insisted that this was no authority, because the Court were equally divided: it was certainly no authority at first, but is now become an undoubted authority; because Mr. Justice *Fortescue* (a) afterwards altered his opinion when he came into this court on being informed of the subsequent determination in the case of *Wright v. Hall*; and it is plain likewise that Lord Chief Justice *Eyre* afterwards altered his opinion, because he gave his judgment otherwise in the case of *Roe v. Fludd*, which I shall mention presently, and in which likewise Mr. Justice *Fortescue* concurred.

1741.
 Doz dem.
 MORRIS
 against
 UNDER-
 BOWN.

The judgment was given in the case of *Wright v. Hall* (b) in this court P. 11 Geo. 1. on a case reserved for the opinion of the Court. The case was this; a man devised lands to *Francis Carter* and his heirs, and several other lands to several other persons in fee; and then follow these words; "all the rest and residue of my messuages lands tenements and hereditaments whatsoever in the parishes of *Edmonton* and *Enfield* or either of them, or in any other town or parish whatsoever, I give to *John Lammas* and his heirs for ever": *Francis Carter* died before the testator; it was holden by the Court that this was a lapsed devise, and that the lands given to *Francis Carter* should go to the heir at law and not to the residuary devisee; and Lord *King* in delivering the opinion of the Court said that though the will was not complete until the death of the testator so as to vest any thing in the devisee, yet that the intent of the testator is to be taken to be as things stood at the time of the making

(a) Mr. Justice *John Fortescue Aland*.

(b) *Fort.* 182. S. C.; and 8 *Mod.* 222.

by the name of *Wright v. Horne*.

of

1741.

DOE dem.
MORRIS
against
UNDER-
DOWN.

of his will; for the testator makes his will as if he were to die that moment, and it cannot be presumed that he intended to devise a contingency which afterwards happened, and which he could not then foresee; which is exactly the present case.

The case of *Roe v. Fludd* (a) was likewise on a case reserved in this court *P. 2 Geo. 2.*; and though it was said by the counsel that no judgment was given, yet my Brother *Fortescue* who was then in court (and who to be sure knows best) says that judgment was actually given by himself and the whole Court. There was another point determined in that case not at all material to the case in question, and therefore I shall only mention so much of it as relates to the present case. A man devised lands to *R. Bishop* and his heirs for ever, on condition to pay all his debts legacies and funeral expences; and at the latter end of his will he gives and devises all the rest and residue of his real and personal estate whatsoever not before therein bequeathed to *Elizabeth Fludd* (the defendant); *R. Bishop* died before the devisor; it was holden by the whole Court that the heir should have the lands devised to *R. Bishop*, and not *Elizabeth Fludd* the residuary devisee; for that the devise must be taken to mean the rest and residue of the lands unbequeathed at the time of the making of the will, at which time all the estate in these lands was disposed of; and the case of *Wright v. Hall* was there cited and relied on.

If the case before the Court were a new case, I should be of the same opinion, but I am very glad that my opinion is supported by three such great authorities (b).

The only question therefore that remains is whether any estate or contingent interest in the premises in question remained undisposed of at the time of the making of this will; if there did, this rule and the cases cited to support it do not extend to the present case; and this was the only doubt that ever stuck with me.

(a) *Fort.* 184. S. C.

(b) See also *Packman v. Cole*, 2 *Sid.* 53. 78; *Bagwell v. Dry*, 1 *P. Wms.* 700; *Owen v. Owen*, 1 *Atk.* 494; *Peat v. Chapman*, 1 *Vez.* 542; *Page v. Page*,

2 *Str.* 820, and 2 *P. Wms.* 489; *Watson v. The Earl of Lincoln*, *Ambl.* 325, 328; *Ackroyd v. Smithson*, 1 *Bro. Ch. Caf.* 503; and *Bennet v. Batchelor*, 3 *Bro. Ch. Caf.* 28.

But

But upon consideration we are all clearly of opinion that nothing remained undisposed of in the premises in question at the time of the making of the will; for that the estate would have vested in *John* at the time of the death of the deviser, and that therefore if he had outlived the deviser it would have descended to his heirs though he had never attained the age of twenty-one. For that the word *then* does not denote the time when the interest is to commence but only the time when the estate is to come into possession, and is exactly the same thing as if he had given the estate to *William Underdown* and his wife for a certain term of years and then to *John* and his heirs, in which case no one would ever have doubted but that, though *John* had died before the expiration of the term, the estate would have gone to his heirs, provided he outlived the testator. And in this opinion we are confirmed by two very great authorities, the one ancient and the other modern, and both of them authorities in point, the words in each of them being almost exactly the same as the present. The first is *Boraston's* case, 3 Co. 19, 20, 21; the second is the case of *Manfield* and *Dugard* determined by Lord *Harcourt* upon great consideration in Chancery *Hil.* 1713, and in which he grounded his opinion upon *Boraston's* case in *Coke*; and this case is reported in the Abridgment (a) of Equity Cases, fo. 195.

There has indeed been some variety of opinions whether in these cases the first taker for years should hold until such time as the son, if he had lived, would have arrived at the age of twenty-one, or whether it should determine immediately upon his death (b): but there is no occasion to give any opinion upon this

(a) 1 Eq. Cas. Abr. 195, pl. 4; and *Gilb. Cas. in Eq.* 36. See also *Goodtitle* d. *Hayward* v. *Whitby*, 1 Burr. 228; and *Doe* d. *Wheldon* v. *Lea*, 3 Durnf. & East 41.

(b) In 3 Co. 19. *Boraston's* case; *Sweet* v. *Beal*, Lane 58; and *Gosley* v. *Gilford*, 2 Vern. 35. it was holden that the first estate should continue until the person named would have attained the particular age. But in *Lomex* v. *Holmeden*, 3 P. Wms. 176, where *A.* devised to his daughters until his son should attain the age of

40 years "hoping by that time his son will have seen his folly," Sir *J. Jekyll* took a distinction between the cases cited and the principal case; he said that where such an estate or interest is created for a particular purpose, *e. g.* for a fund for payment of debts (as in *Boraston's* case) and the cestui que vie died before the expiration of the term, "in aid of the honest intention of the party who may be supposed to have computed the time wherein the profits of his estate would be sufficient for that end, the Courts have construed the deviser to have

1741.
Doe dem.
MORRIS
against
UNDER-
DOWN.

1741.

• Doe dem.
MORRIS
against
UNDER-
DOWN.

this in the present case, it being found in the special verdict that *John*, if he had lived, would have been twenty-one before the demise laid in the declaration.

There were two objections mentioned on the part of the defendant, which it may be proper just to take notice of in order to give an answer to them.

The first was that it was the intent of the testator that *William Undrdown* and his wife should have 10*l.* a-year out of the whole premises during their lives, whereas by this construction they will be deprived of one third part of it.

The other was that he has directed his residuary devisee to pay his debts funeral expences and some of his legacies, and that by this construction the fund may be rendered deficient, and some of his debts remain unsatisfied contrary to justice and contrary to his intent.

There was an answer endeavoured to be given to both these objections, that the estate will pass cum onere to the heirs: but to be sure that is not so, because they do not claim under the will. But the true answer is, to the first objection, that it is casus omisus, a case which the testator did not foresee, and therefore did not provide for, and we are not to make a new will for him. And to the latter that he could not intend that this contingent interest should be a fund for the payment of his debts &c, which he could not foresee would ever arise, and which most probably never would. Besides in the first case, if we should construe the estate to belong to the residuary devisee, it would certainly, as that devise is worded, not be liable to the payment of any part of the 10*l.* a-year. And in the second case, it is certain that if *John* had survived the testator, this

have meant that the devisee or executor should have the land for so long time as that when the son, if he had lived, would have arrived at the age mentioned: but that in all cases where no such intention appeared, the estate or interest would absolutely determine by the death of the

party under the age specified;” and as the devisor’s reason for creating the particular estate in that case appeared to be “to guard his estate against the ill conduct and extravagance of his son,” his Honor accordingly ruled that the particular estate ceased on the son’s dying under 40.

estate

estate would not have been subject to the payment of the testator's debts, legacies, &c, in the hands of *John* or his heirs, and therefore it is plain that the testator never intended that it should.

We think therefore that there is no weight in either of these objections; and for the reasons which I have already given we are all of opinion that judgment must be for the plaintiff."

ROE on the Demise of FULHAM &c against
WICKETT &c.

THE following opinion of the Court was given by

Willes, Lord Chief Justice. "This comes before the Court on a case made many years ago before the Lord Chief Justice *Eyre* at his sittings at Guildhall, and which by reason of many accidents that have happened still remains to be determined.

The case is thus. *Robert Waitb*, having a wife *Katherine* and no issue or brother, but three sisters, *Mary* the wife of *William Wickett*, and *Elizabeth* and *Anne* then unmarried, by will dated the 8th of *December* 1686 gives all his lands tenements and hereditaments whether in fee-simple, for life or lives, leases for years, in possession or reversion, to his wife for her life; and after her decease he devises the same to such child as his said wife was then supposed to be with child with and enseint of and to the heirs of such child for ever. "Provided always, and my will and meaning is, that if such child as shall happen to be born as aforesaid shall die before it has attained to the age of twenty-one years leaving no issue of it's body, the reversion of one full third part of all my lands tenements and hereditaments shall go and be to my said wife *Katherine* and her heirs for ever, to the only use of her and her heirs; and one third part of my said lands tenements and hereditaments shall be and go to my sister *Elizabeth* and her heirs for ever; and the other remaining third part of the said lands tenements and hereditaments shall be and go to my sister *Anne* and her heirs for ever." Then follow these words; "Item I give to my sister *Elizabeth* 600 *l.* to be added to her father's legacy. Item, I give to my sister *Anne* 400 *l.* to

be

1741.

DOE dem.
MORRIS
against
UNDER-
DOWN.

H. 15 Geo. 2.
Wednesday,
Feb. 3d.
1741, 2.

Devise of freehold lands to the wife for life, and after her death to such child as his wife was enseint of in fee; "Provided that if such child, as should happen to be born as aforesaid, should die before 21 without issue the reversion of one third should go to the wife and the reversion of the other two thirds to two of the devisor's sisters;" The wife was not enseint at all; held that the remainder over depended on the birth of a child and it's dying under 21 and without issue; that as those events never happened the remainder over did not take effect, but that the heirs at law of the devisor were entitled to take.

1741, 2.

Rob dem.
FULHAM
against
WICKETT.

be added to her father's legacy. Item I give to my sister *Mary Wickett* 5 l." And he made his wife *Katherine* sole executrix. *Katherine* was not with child at the time of making the will nor at any time by the testator, who died three or four days after making his will. The premises in question are lands of which the testator was seised in fee-simple at the time of making his will. The defendants claim a third part under the said *Mary Wickett* one of the sisters and coheiresses of the devisor. The lessors claim under *Katherine* the wife of the devisor and his two other sisters *Elizabeth* and *Anne*.

The question reserved was whether, as *Katherine* was not with child at the time of making the will nor at the time of the death of the devisor, and so no such child was ever born, the devise of the remainder to *Katherine* the wife and the two sisters *Elizabeth* and *Anne* in fee could ever take place. If it did, then the verdict for the plaintiff was to stand for the whole; if it did not, the verdict was to be entered up only for the two thirds; and costs were by the rule directed to go according to the determination of the question reserved.

This case was spoken to in the last term only before myself and my Brothers *Parker* and *Burnett*; and my Brother *Fortescue A.* was likewise absent when it was spoken to in *Trinity* term (a); and therefore we did not consult with him about it: but my Brothers *Parker* and *Burnett* and I are all of the same opinion.

If there were nothing more in this case but the question reserved on the trial at nisi prius, I own I think it so very plain and so very clear a point, that I should have had no doubt concerning it. But as there has been a judgment given in the Court of King's Bench upon another part of this will, which may at first sight seem to interfere with ours, and as Lord *Harcourt* has made a declaration and in some measure given his opinion upon these very words of the will on which the present question arises, which is not agreeable to our sentiments, for these reasons we

(a) The first time the argument occupied two days; the second time the case was argued by *Willes* Serjt. for the plaintiff and *Skinner* Serjt. for the defendants.

have thoroughly considered (a) the case, and for these only I shall be longer in delivering the opinion of the Court than the case itself would otherwise require.

1741, 2.

ROB dem.
FULHAM
against
WICKETT.

This case has been very much obscured by many points which have been insisted on, and by many cases which have been cited to support them, which we think are in nowise material to the point in question. I shall therefore in the first place endeavour to deliver the case from that which does not belong to it, in order to find out what the real question is.

First, there were a great many things said and a great many cases cited in respect to devises to a child in ventre sa mere; in some of which it was holden that all such devises are void; in some, that such devises, if they be devises in presenti, are void, but if they be devises in futuro, they are good; and some Judges have holden (but I think there is no case so adjudged) that all such devises are good, because all of them are in their nature devises in futuro. It is plain, by the cases which are cited upon this head, that many of those who have talked about it have confounded themselves by not distinguishing between a devise being void ab initio and it's becoming void afterwards. For (to be sure) if a child be never born the devise becomes void. Which of these opinions in respect to these devises we think to be the best, it will be time enough for us to determine when the case comes in judgment before us. But in the present case we do not think it at all material whether this devise to the child of *Katherine* in ventre sa mere be a good devise or not; for laying this devise quite out of the case, the subsequent devise will depend just on the same contingencies and will fall under just the same considerations.

(a) It appears from another note that the Chief Justice was prepared to give the judgment of the Court in the *Michaelmas* term preceding, but that in deference to Lord *Harcourt's* opinion he reconsidered the case; speaking of this case, he observed "I intended to have given judgment upon this day (*Saturday, November 28th*) but on

looking into Lord *Harcourt's* decree in order to give judgment, he seeming to have determined the very point in question upon great consideration and to be of a different opinion from us, I thought it best to reconsider the case, and to defer giving judgment until the second day of the next term."

1741, 2.

ROE dem.
FULHAM
against
WICKETT.

To shew that this was a material part of the case, two things were insisted on in the argument, which when considered will appear to be of no weight.

It was said on the part of the plaintiff that if this devise were void, the condition annexed to it must be void too; and consequently the devise will become an absolute devise in remainder, to take place immediately after the devise to *Katherine* for life. But if the devises were so connected that the conditions annexed to both must stand or fall together, the consequence would be just the reverse of what has been insisted on on the part of the plaintiff. For the devise to the wife and the daughters would for that very reason be void, as was determined in the case of *Roe v. Fludd* (a) in this court P. 2 Geo. 2. That case was thus; there was a devise of lands to *R. Bishop* and his heirs upon condition that *R. Bishop* should pay all his debts and legacies, and if he did not pay them then he devised the lands to *Elizabeth Fludd* and her heirs. *R. Bishop* died before the devisee; and it was holden by the whole Court that the subsequent devise to *Elizabeth Fludd* depending on a condition annexed to the former estate, and that estate and consequently the condition annexed to it becoming void before the death of the testator, the subsequent devise was likewise become void, and that it could never take place. But as we are of opinion that the subsequent devise in the present case does not depend upon any condition annexed to the precedent devise, we think that this argument does not weigh either the one way or the other.

To shew that this question concerning devises in ventre sa mere was material in the present case, it was said on the part of the defendants that if there be a devise to one for life, and afterwards to another in remainder, and the first devise is void either by the first devisee's dying before the devisor, or by the first devisee's being a person incapable of taking, (as in the case of a devise to a Monk) the devise in remainder will take place immediately. And to this purpose they cited *Perkins tit. Devises. f. 566, and 567, and several other books.*

(a) *Fort. 184*; and cited in *Doe d. Morris v. Underdown, sup. 300*, for another purpose.

And

And to be sure this is good law : but it is not at all the present case. And there is no book or case in which it is said, if there be a devise to one for life, and a devise to another in remainder which was void in it's creation as being contrary to the rules of law or for some other reason, that by the first devise's becoming void the subsequent devise is made good ; or which is exactly the same thing, if the first devise be void, and there be a subsequent devise to another upon a contingency which never happens, that the subsequent devisee shall take the estate, though the contingency never happens, because the first devise is void, which is exactly the present case. I think I have said enough to clear the question of this knotty point concerning devises to children in ventre sa mere.

1741, 2.

ROE dem.
FULHAM
against
WICKETT.

Some things also were said concerning contingent remainders and executory devises ; and a doubt was started whether the devise in question be a contingent remainder or an executory devise : but we think that it is not at all material whether it be a contingent remainder or an executory devise, because in either case it can never take effect, if the contingencies on which it depends never happen. But I think at last it seemed to be admitted on the part of the plaintiff that it must be an executory devise (a), and to be sure it is so, it not being such a limitation as can take effect as a remainder according to the rules of law.

But then taking it to be an executory devise, many things were said and many cases cited on both sides relating to the doctrine of executory devises. On the part of the plaintiff it was insisted that this was a good executory devise within the rules which have been laid down concerning such devises, and that the contingencies are not too remote. And on the part of the defendants it was insisted that the contingencies are too remote, and that no case has gone so far as this.

If the contingencies had happened on which this devise depends, this might have been a material question, and we would have given it a proper consideration : but as none of the contingencies happened, it is quite out of the case ; and therefore

(a) Vid. 1 Will, 106; and 2 Fearn, 19, 20, 21.

I shall

1741, 2.

Roe dem.
FULHAM
against
WICKETT.

I shall only say thus much upon it, that we think that the contingencies are not too remote, as they must all happen in less than twenty-two years, and upon the death of a person who must be born in less than a year after the death of the testator (a). There are several cases that have gone much farther than this: but I shall only mention the case of *Maffenburgh* and *Asb*, 1 *Vern.* 234, 257, and 304. That was a case upon the limitation of a term in a deed, but it was said to be determined according to the rules of executory devises; and the limitation there was holden to be good, though the contingency might not happen until twenty-one years after a life then in being: but it was held that this was a reasonable time, and that it did not tend to create a perpetuity. And as this case was very thoroughly considered, and not determined by the then Lord Keeper until he had had the opinion of the Court of Common Pleas upon it, so it has been cited a great many times both in Courts of Law and Equity, and has always been held to be rightly determined.

Many things were likewise said in the argument of the present case, and many cases were cited to shew that the word "provided" was sometimes understood to make a condition and sometimes as a word of limitation; and if it were material, and we had nothing else to do, the books are so fruitful upon this subject that we might cite nearly as many cases upon this head as in cases of actions of slander, which are almost innumerable. But there is but one plain rule to go by, which is that this must be taken either to be a word of limitation or condition according to the wording of the will or deed, and according as the intent of the devisor or the parties appears to be. And if it were material to determine this point here, I would try it by this rule: but we do not think it at all material in the present case whether this be a condition or a contingent limitation; for if it be a condition precedent, in that case the estate will not vest until the condition is performed; and if it be a contingent limitation or rather an executory devise (as it certainly is,) in either of these cases (as I have already observed) the devise can never take effect unless the contingency happen.

(a) Vid. *Goodtitle d. Gurnall v. Wood*, T. 13 & 14 Geo. 2. *sup.* 213; and *Long v. Blackall*, 7 D. & E. 100.

Having now cleared the case from the rubbish, there remains only this plain simple question, whether, when a man has devised an estate to another upon three contingencies, the devisee can have the estate though none of those contingencies ever happen, and this to the disinherison of the heir at law. And one would think that the mere stating of this question would be sufficient to determine it; and yet this is the whole of the present case. But as it has been so much and so long litigated, I shall beg leave to say a little more upon it.

1741, 2.

ROE dem.
FULHAM
against
WICKETT.

The estate in question is devised to the wife and two of the sisters upon these contingencies;

- 1st, If a child happen to be born;
- 2dly, If that child die before the age of twenty-one;
- And 3dly, Die without issue;

If these contingencies happened, the devise was to take effect: none of them happened, but another contingency, that there was no child born. How the estate was to go in that case there are no directions in the will: but it is plainly casus omissus, either by mistake, because the testator did not think of it (considering it as certain that his wife was then with child,) or on purpose, because he did not intend that his estate should go in that manner in case his wife had no child; and I think it will not be at all material whether this case were omitted by mistake or design.

The rule of law is that an heir at law shall not be disinherited by a devise, unless there be express words or the intent of the devisor be manifest and apparent. Lord Chief Justice *Vaughan* carries it farther in the case of *Gardner v. Sheldon*, and says that there must be a necessary implication: but I have often said that this is carrying it too far (a), and that the other is the true rule. Now it must be admitted in the present case that there are no express words in this will to take the estate from one of the coheirs in the case that has now happened. But it has been insisted on that this, though not expressed, appears to be the intent of the devisor; first, because he has given his sister *Mary* only 5 *l.*; secondly, because it is equally reasonable that the wife

(a) See *Moore d. Fagge v. Heafeman*, H. 12 Geo. 2. sup. 140, 141; and the cases there cited.

1741, 2.

Roe dem.

FULHAM

against

WICKETT.

and the other two sisters should have the estate in case there was no child born as in case such child died without issue before the age of twenty-one.

As to the first, it is a foreign and uncertain presumption. He does not give his sister *Mary only* 1 s., as if he designed to disinherit her according to the vulgar notion, which I own ought to be principally considered in wills. And no one can say that, because he intended that his sister *Mary* should have only 5 l. in case he had had a child who might have lived to nineteen or twenty years, and have wanted a maintenance during that time, therefore he intended to disinherit his sister if he had no child born at all. This is a very strange and a very uncertain presumption, and certainly does not amount to a manifest proof of his intention; and I think that the contrary ought rather to be presumed.

As to what was said that it is as reasonable to suppose that the testator intended that the estate should go in the same manner in case he had no child as in case a child had been born and had died without issue before the age of twenty-one, this is at best but conjecture, and is to make a will for the testator instead of putting a construction on that which he himself has made. It is possible (to be sure) if he had thought of this case that he would have devised the estate in the same manner. But there are (I own) some, at least as many and as strong, reasons to induce me to think that if he had thought of it he would not have done it. But it is certain he has not done it: and as it is exceedingly doubtful whether he omitted it on purpose or whether if he had thought of the case he would have devised his estate in the same manner, can any one say that the intent of the deviser is manifest and apparent? and if not, the rule of law is that an heir shall not be disinherited, and *Mary* his sister was one of his coheirs.

Though many cases were cited in the argument of this case, all of them (except five) related to those points which I have endeavoured to lay out of the way as perfectly immaterial; and therefore I shall take no notice of them, but shall confine myself entirely

entirely to those five cases which relate to the real point in question.

1741, 2.

ROB dem.
FULHAM
against
WICKETT.

The first was the case of *Sowell v. Garrett*, or *Soulle v. Gerrard*, *Moor* 422; and *Cro. El.* 525. The case, as it is reported in *Moor*, is thus; a man devises his estate to his son *Richard* and his heirs, and if he die without issue or before the age of twenty-one then he devises the estate to another: *Richard* had issue and died before the age of twenty-one; held that his issue should have the estate, and not the remainder-man, for that the word "or" should be construed as "and" (a). This case was cited to shew that in cases of wills words shall be construed contrary to their natural sense to answer the intent of the testator. But this case for many reasons is of very little authority in the present; 1st, As this is a single case, and no case has gone so far as this, it is not therefore a case of the greatest authority (b). 2dly, As it is reported in *Croke*, the Court seemed to go upon several other reasons which do not occur in the present case. 3dly, But the principal reason that I go upon is that the Court was there of opinion that the intent of the testator was plain and manifest, which differs it widely from the present case. Besides so far as I can collect from the state of the case, for it is stated but obscurely in both books, this construction did not disinherit the heir (c), but was made in his favour against a remainder-man.

The next case which was mentioned was *Holcroft's* case, *Moor* 486, 7, which was thus; the uses of a fine were declared by deed in this manner, to the grantor for life and after his death to his son for life, and after the death of his son to the use of his first son and the heirs male of his body, and so suc-

(a) Or in a will may be read *and*, and vice versa, to give effect to the intention of the deviser. *Price v. Hunt*, *Pollexf.* 645; *Collenfon v. Wright*, 1 *Sid.* 148; *Helliard v. Jennings*, 1 *Ld. Raym.* 506; *Framlingham v. Brand*, 3 *Atk.* 390, and 1 *Willf.* 140; *Right v. Hammond*, 1 *Str.* 429; *Barker v. Suretees*, 2 *Str.* 1174; *Brown-sword v. Edwards*, 2 *Vez.* 248, 9; *Wright d. Burrill v. Kemp*, 3 *D. & E.* 470; and *Doe d. Davy v. Burnfall*, 6 *D. & E.* 34.

—And even in the case of a surrender of a copyhold the Court construed "or" to mean "and", in order to effectuate the intention of the parties. *Wright d. Burrill v. Kemp*, 3 *D. & E.* 470.

(b) But it was recognised as law by Lord Holt in *Helliard v. Jennings*, 1 *Ld. Raym.* 506, and by Mr. J. Butler in 3 *Durnf. & East* 474.

(c) This does not distinctly appear by either of the reports.

But not as to holding or and. for Lord Holt is that the case was determined on the ground of an estate tail. I suppose that the C^t gave no positive opinion as to the other points. In 12. Mod. 277. He is stated in same case to have denied *Soulle v. Gerrard* to be law, & this is confirmed by Lord Ch. B. Comyns's Rep. of same case. See Com. Rep. 95.

1741, 2.
 ROE dem.
 FULHAM
 against
 WICKETT.

cessively to the second, third, and fourth, sons in tail male; and if it fortune that the said fourth son die without heirs male, then to the use of another person in tail male, with divers remainders over. The son of the grantor had only one son, who died without issue male, so that he never had a fourth son, and yet adjudged that the remainder-man should take. But this being a settlement plainly intended to be in the common way of limitations, there could be no doubt of the intent of the parties; and therefore the words "if it fortune that the fourth son die without issue" were construed to signify the same as "for default of such issue," and therefore that case is in nowise parallel to the present.

The next case that was mentioned was the case of *Estcourt v. Warry*, Comb. 437; which is reported in another book (a), Established Cases in the reign of William III. by the name of *Grascoe and Warren*; and I know not how to distinguish that case from the present. The case was thus; a man possessed of a term devises it to an infant en ventre sa mere provided it be a son, and if the child be a son and die in its minority then to another; the child was a daughter who died in her minority; and it was adjudged upon a special verdict in the Court of King's Bench that the devisee over could not take, because there was a condition precedent which never happened. It might have been said in that case, as has been said in this, that it is as reasonable to suppose that the deviser intended that the estate should go to the devisee over in case he had no child as in case he had a son born who died without issue, and yet no such thing was insisted on. It is frequently very difficult in cases of wills, which are drawn by ignorant persons, to find two cases that agree with each other in every respect: but I think that this case and the present come very near to each other, only the present case is in one respect stronger for the defendants; because here an heir is to be disinherited; the case cited was only the case of an executor, who is not favoured in law as an heir at law is.

The next case was the case of *Andrews v. Fulham* (b), determined in the King's Bench upon the words of this very will 20th of

(a) 12 Mod. 128; and 2 Eq. Cas. Abr. 361. (b) 2 Str. 1092; 2 Eq. Cas. Abr. 294. pl. 24; Andr. 263.

June 1738. As that court is the court which has the revifal and correction of the judgments of this court, its determinations ought to have great weight here; and this judgment, I own, weighs the more with me, becaufe the Judges who prefided in that court at that time were perfons of great knowledge and abilities. But however I think it may be plainly diftinguifhed from the cafe now before the court; or, if it could not, all that we could do is to give that judgment its due weight and a thorough confideration, but we muft at laft be determined by our own. Now that cafe is plainly different from the prefent cafe. It was a determination only *on a leafehold eftate*, and upon that foot many things were faid at the bar to diftinguifh that cafe from the prefent. As, firft, that the perfon who was the plaintiff there, and againft whom the judgment was given, was the representative of a perfon who had affented to the devife over, and therefore was concluded. 2dly, That the fame words in a will may have a different conftruction in refpect to a leafehold and in refpect to a freehold eftate. Whether thofe diftinctions were infifted on by the counfel in the King's Bench or relied on by the Court, I cannot fay: but I find from a very good manufcript report which I have feen of that cafe that a cafe was there cited concerning a freehold, which was admitted to be law againft the opinion of the Court, but the Court faid in answer that the cafe then before them being the cafe of a leafehold the proviso muft have a different conftruction. And I am willing to think that the Court went upon this diftinction; for it is certain that the fame words in a will may have quite a different conftruction in refpect to leafehold and freehold eftates. It was fo determined in the cafe of *Papillion v. Voyce* (a) both by the Mafter of the Rolls and the Lord Chancellor after very great confideration; and I could mention many other cafes to the fame purpofe, but I choofe rather to put one plain inftance to illuftrate it, and fhall then leave it. Suppofe a man devifes freehold and leafehold eftates to A. and the heirs of his body, remainder to B. and the heirs of his body; the remainder in refpect to the leafehold eftate can never take place, becaufe it

1741, 2.

ROB dem.
FULHAM
againft
WICKETT.

(a) 2 P. Wms. 471.—See alfo *Forth v. Chapman*, 1 P. Wms. 667; *Atkinson v. Hutchinson*, 3 P. Wms. 260, 261; *Read v. Snell*, 2 Atk. 647; *Sheffield v. Ld. Orrery*, 3 Atk. 288; *Earl of Stafford v. Buckley*, 2 Vez. 180; and *Southby v. Stonehouse*, ib. 616;—But fee cont. *Porter v. Bradley*, 3 D. & E. 146; *Daintry v. Daintry*, 6 D. & E. 314; and *Roe d. Sheers v. Jeffery*, 7 D. & E. 589.

1741, 2.

ROE dem.

FULHAM

against

WICKETT.

cannot be limited after an estate-tail: but it is plain that the remainder to *B.* in respect to the freehold estate is good.

There is but one case that remains to be taken notice of, and that is the case of *Jones v. Westcomb* (a), which was determined by Lord *Harcourt* in Chancery 30th of October 10 Anne. I have not been able to obtain a report of that case, but so far as I can collect from the decree the principal matter in judgment before the Court was in respect to the personal estate, of which the plaintiffs prayed a distribution as next of kin, as to which the Lord Chancellor did not think proper to give them any relief; and one reason is given, amongst others, that such a suit in a Court of Equity ought not to be encouraged after the right had been submitted to near twenty years. He does indeed declare that the devise over to *Katherine* the wife and the two sisters even of the freehold estates was good, and likewise dismisses the plaintiffs' bill so far as it seeks to impeach their title to those estates: but as it was not directly the point before him, and therefore does not seem to have been thoroughly considered, I cannot lay any great stress upon this declaration of Lord *Harcourt* though a very great man, and the rather because at the end of his decree he has ordered the deeds and writings relating to the freehold estates to be brought into court that the coheirs might resort thereto and take copies of them as they should think fit; which seems as if he determined nothing in relation to this point but left the plaintiffs to try their title at law, and gave some assistance for that purpose. So that I think that Lord *Harcourt's* opinion, for which I should have had the greatest regard if it had been the point directly before him, and he had positively determined, it does not stand in our way.

We are therefore of opinion, for the reasons aforesaid, that the devise in remainder to *Katherine* and the two sisters *Elizabeth* and *Anne* never took effect, that consequently upon the death of *Katherine* (who died in 1729, though it is not stated in the case,) the third part of the premises in question descended to *Mary* one of the coheirs of the deviser, under whom the defendants claim; and that therefore according to the rule the verdict must

(a) *Gillb. Eq. Cas.* 74; *Prec. in Chanc.* 316; and 1 *Eq. Cas. Abr.* 245.

be entered up for the plaintiff only for two thirds of the premises, and as to the other third part for the defendants (a)."

1741, 2.

ROE dem.
FULHAM
against
WICKETT.

(a) But notwithstanding the elaborate discussion of this case by the learned Chief Justice, it seems difficult to support the opinion here given; it being contrary not only to the determination of Lord Harcourt in *Jones v. Westcomb*, (which was approved by Lord Hardwicke in *Fonereau v. Fonereau*, 3 Atk. 317, 318, and by Lord Mansfield in *Frogmorton d. Bramston v. Holyday*, 3 Burr. 1623, 4, and in *Doe d. Watson v. Shippard*, Dougl. 79.) and to that of the Court of King's Bench in *Andrews v. Fulham*, T. 11 Geo. 2., both of which cases arose on the construction of this will respecting the leasehold premises, but also to the decision of the Court of King's Bench in a subsequent case, *Gulliver v. Wickett*, M. 19 Geo. 2. 1 Will. 105., on the same question as arose in the principal case (*Roe v. Wickett*) respecting the freehold estate.—See also *Arvelyn v. Ward*, 1 Vez. 420; *White v. Barber*, 5 Burr. 2703; *Taylor v. Taylor*, 1 Atk. 386; and *Statham v. Bell*, Cowp. 40; the two latter of which cases strongly militate against this decision. In *Taylor v. Taylor*, the words of the will were "as to my copyhold which I have or intend to surrender to the use of my will, I give &c, and the remaining third I give to the child

with which my wife is now enseint and to the heirs of such child for ever: but if such child should not be born alive, or being born alive should die without leaving lawful issue, or before he or she has disposed of the same, I give it to my wife:" the wife was not with child, and Lord Hardwicke Chancellor ruled that the will must be construed "and if no child be born alive &c."—In *Statham v. Bell*, the deviser supposing his wife to be enseint, devised to the child if a son when he should attain twenty-one, if a daughter then one moiety to his wife and the other moiety to his two daughters (there being one then alive) when they should attain twenty-one; if both died before twenty-one their moiety to go to the wife and her heirs, if she died her share to go to them; the wife was not enseint, the daughter afterwards died under twenty-one, without issue; and held that the wife was entitled to the whole; the Court of B. R. certifying to the Lord Chancellor, "that it was the plain intention of the testator that in case no son should be born, and he should have no daughters who should live to the age of twenty-one years, the wife should have the whole estate."

NEWTON *against* WALKER.

Hil. 15 G. 2.
Thursday,
Feb. 4th.

"MOTION against an administrator to pay a certain sum of money which the intestate was obliged to pay by rule of Court entered into at the trial at nisi prius and afterwards, in *Newton's* lifetime, made a rule of this Court.

No attachment against an administrator for not performing a rule of Court entered into by the intestate.

We denied it as we had done in the same case several times before (a).

1st, Because we had no method to enforce the rule even against the party himself if he had been alive, but by process of contempt which is personal, and cannot be carried on against the administrator.

(a) See *Want v. Swayne*, M. 13 Geo. 2. sup. 185.

2dly,

1741, 2.

NEWTON
against
WALKER.

adly, Because the administrator may have no assets (a), and this would be a very improper way of trying that matter; nor would a determination in this case bind the rest of the creditors, nor could it be pleaded to any other demand."

(a) See *Howard v. Ratborne*, *infra*, and the cases there referred to.

Wednesday,
Feb. 10th.

HOWARD Executor &c. against RATBORNE.

There may be the like judgment as in case of nonsuit against an executor plaintiff, for not going on to trial, under stat. 14. G 2. c. 17, but without costs.

Barnes 130.
S. C.

"THE defendant had obtained the common rule for a nonsuit on the late statute.

And on shewing cause against it, it was insisted that the plaintiff being an executor ought not to pay costs (a), and that therefore

(a) *Bennet* administrator v. *Coker*. 4 Burr. 1928; and *Read* executor v. *Thornton*, Tr. 37. Geo. 3. B. R. S. P.—Nor does a plaintiff executor pay the costs of a nonsuit, in the ordinary case. *Higgs* administratrix v. *Warry*, 6 D. & E. 656.—But he pays the costs of a nonpros. *Hawes* executrix v. *Saunders*. 3 Burr. 1584; *Lumley* v. *Nichols*, Sir. G. Co. 14; *Say*, Costs, 94; and *Higgs* administratrix v. *Warry*, 6 D. & E. 654. Or costs for not going to trial according to notice. *Eaves* v. *Mocato*, Salk. 314. contra *Bennet* v. *Coker*; 4 Burr. 1927—In certain cases, where the plaintiff executor has not been guilty of laches, the Court will give him leave to discontinue without paying costs. 4 Burr. 1928, 9.—An executor may make himself liable to costs, by applying to be made party to a rule of Court in which costs are reserved. The executors of *Smales* v. *Waite* one &c. Jan 27th, 1745, 6. C. B.

"This motion had hung a long time in this court.

The first motion was by *Smales*, complaining of excessive damages in a second writ of inquiry in an action of trespass brought by *Waite* for an exorbitant distress (as was suggested) taken by *Smales* against *Waite*.

There had been a former writ of inquiry, in which 350 l. damages had been found: but that had been set aside for irregularity; and in the second writ of inquiry the jury found 400 l. damages.

A rule nisi was obtained to set aside that inquisition as excessive, but was discharged by *Waite* upon shewing cause and reading many affidavits. After that he proceeded to judgment, and a writ of error being brought the judgment was affirmed in B. R., and another writ of error was brought in the House of Lords; and whilst that was pending, it was discovered by *Smales* that *Waite's* most material affidavits, by which he discharged the rule, were sworn before one *Martindale*, who had no commission to take affidavits. Upon this a fresh complaint was made to the Court by *Smales*, suggesting that *Waite* and his witnesses knew that *Martindale* had no commission and therefore did not regard what they swore, as they were not liable to be indicted for perjury, and that this was a contrivance of *Waite's* to impose upon the Court by laying false affidavits before the Court in order to get the rule against him discharged. The judgment obtained by *Waite* was affirmed by the King's Bench, and gone up to the House of Lords, so out of our power.

We therefore made a rule against *Waite* to shew cause why an attachment should not go against him; and when he came to shew cause, he insisted he did not know at the time of swearing the affidavits that *Martindale* had no commission, (though he admitted that he had none,) and that none of the persons who made affidavits before him knew it, but that both

therefore costs ought to be left out of the rule. And upon looking into the statute, 1741, 2.

HOWARD
against
RATBORNE.

We were all of that opinion; and therefore proposed it to the defendant to wave his rule, as it would be of little or no advantage to him. But he insisting on the rule, we made it absolute, but ordered costs to be left out."

both he and they thought that he had one, he having taken upon him to take affidavits for other persons for a long time before. And he insisted that nothing was sworn in the affidavits on his part in order to discharge the first rule but what was strictly true.

The Court likewise was informed that an information was granted by the Court of B. R. against *Waite* for his mal-practice in obtaining these affidavits, on a supposition that he knew that *Martindale* had no commission.

Upon this and *Waite's* consenting to stay proceedings upon the judgment, we ordered him to proceed again to execute a writ of inquiry before the judge of assize, without setting aside the former inquisition, but with directions that *Smales* should not insist that a writ of inquiry had been executed before nor upon the judgment which *Waite* had obtained in bar to this inquiry. And we enlarged the rule for an attachment until after the information tried, and the inquisition on this writ of inquiry.

Before either, *Smales* died, and his executors applied to the Court to be at liberty to go on with the trial, and to stand in the place of their testator to all intents and purposes, and a rule by consent was made accordingly. *Waite* being acquitted by a jury upon the trial of the information, we discharged the rule for an attachment against *Waite*, but reserved the costs and all further directions until after the inquisition upon the writ of inquiry. That came on at the last York Assizes, and the jury found damages for *Waite* 400*l.* as the former jury had done, and no motion was made to the Court within the four first days of the last term to set aside the inquisition for excessive damages, or for any other reason.

We were therefore of opinion that Mr. *Smales* had been in the wrong from the beginning, and that *Waite* had not been guilty of any mal-practice, and we made a rule to give *Waite* liberty to proceed on his judgment. And as he had been kept out of his money so long by the motions and proceedings in this court, the first inquisition being in 1741, we thought it reasonable to give him the costs of the last inquisition and the costs of all the proceedings in our court, except of a rule which was made by consent for enlarging the time of the trial from the Lent until the Summer Assizes. It was insisted that the executors ought not to pay costs, as it did not appear that they had assets: but it was answered by the Court that they had made themselves liable by agreeing to stand in the place of their testator, and by entering into a rule by consent, wherein costs were reserved." MS. *Willes* Chief Justice.

—An executor or administrator may also make himself personally liable for the plaintiff's demand by giving a bond to abide by an award to be made touching the matters in dispute between his intestate and the plaintiff, though the arbitrator award that he, as administrator, shall pay; and consequently to debt on such a bond the administrator cannot plead *plene administravit*. *Barry v. Rush*, 1 Durnf. & E. 691.—And for non-payment the arbitrator may be attached, if the submission be made a rule of Court. *Worthington v. Barlow* administratrix, 7 D. & E. 453.—But where the arbitrator only ascertains the amount of the demand, without ordering the administrator to pay it, it does not operate as a determination by the arbitrator that the administrator had assets, and if he has no assets, he is not bound to pay. *Pearson v. Henry*, 5 D. & E. 6.

1741, 2.

Hil. 15 G. 2.
Friday,
Feb. 12th.

Venue changed, after an order for time to plead.

ROWLEY *against* ALLEN (a).

“**MOTION** to change a venue after a rule obtained from a Judge for further time to plead, but before any plea pleaded.

All the officers of this court certified that it has been the constant practice of the Court never to change the venue after an application for time to plead and a rule or a Judge's order obtained for that purpose. That it had been so determined over and over again, (of which they gave several instances) nay that it had been ruled several times that after taking out a Judge's summons for time to plead, the party so applying should not be at liberty afterwards to move to change the venue.

But my Brother *Parker* and *I* thought this a most unreasonable practice, and the rather because it was alleged, (and upon inquiring of the Judges of the King's Bench I find the allegation to be true,) that in that court they always allow the defendant to move to change the venue at any time before a plea pleaded. And as the rule stands in this court, it is a great hardship on a defendant; for if he lives at the distance of two or three hundred miles the plaintiff may bring his action in *Middlesex* (b), and before the attorney can have instructions from his client to move to change the venue the time for pleading will be out; and if he applies for further time, he is then, it seems, too late to make such a motion, which is most absurd and unreasonable.

However we thought ourselves bound by the present practice until we made a rule to alter it, but resolved to make such a rule.”

(a) Vid. *Dennis v. Fletcher, Barnes* 489. S. P.

(b) But the distinction that now prevails obviates this inconvenience. “The distinction is this; The venue may be changed after an order for time to plead, though upon the terms of pleading issuably; but not after an order for time to plead,

where the terms are to plead issuably and take short notice of trial at the first sittings in London or Middlesex, because there a trial would be lost.” *Petyt v. Berkeley, Cowp.* 511. See also *Hunter v. Gray*, and *Smith v. Gray, Barnes* 493; and *Shipley v. Cooper*, 7 D. & E. 698.

THOMAS MUSGRAVE *against* THOMAS CAVE and
THOMAS FRANKLYN.

1741, 2.

Friday,
Feb. 12th.

THE opinion of the Court was delivered, as follows, by

Willes, Lord Chief Justice. "Trespafs. The declaration sets forth that the defendants on the 1st of *May* 1738 and at divers other times between that day and the second of *October* following broke and entered the plaintiff's close, *viz.* one acre of land at *Wentworth* in the *Isle of Ely* in a field there called the *Old Field*, and trod down and consumed with their feet in walking the plaintiff's grass there growing, to the value of 40s., and ate up trod down and consumed other grass of the plaintiff's there growing with cattle, *viz.* horses, mares, geldings, bulls, cows, oxen, hogs, and sheep, to the value of 100l.; et alia enormia &c. To the plaintiff's damage of 10l.

The defendants to the force and arms &c plead not guilty;

And as to the rest of the trespass say that the place in which &c at the times when &c was one acre of land in the said field called *Old Field* in *Wentworth*, abutting as is described in the plea; and that the same is and at the times when &c was the freehold of the defendant *Cave*; so he and the other defendant in his right justify the trespass laid in the declaration as being done in the freehold of the defendant *Cave*.

The plaintiff in his replication makes a new assignment, and says that the trespasses laid in the declaration were done in one acre of land of the plaintiff's lying in *Old Field*, which he describes to be bounded in a different manner from the acre set forth in the plea.

To this the defendants in their rejoinder say that as to all the trespasses in the said acre of land new assigned, except the breaking and entering into the acre of land new assigned, and treading and consuming with their feet in walking the grass there growing, and eating up treading down and consuming with ninety sheep, parcel of the cattle in the declaration mentioned, other grass there growing, they are not guilty. And as to this residue

In pleading a common of pasture, it is not necessary to allege in express terms whether it be common appurtenant, appurtenant, or in gross: but the Court will judge of it from the nature of the right claimed. — Common of pasture, without land, may be parcel of a manor, tho' demised and demisable by copy of court roll; and if it be claimed by the lord of a manor in the soil of another for a certain number of cattle, without regard to levancy and couchancy, and be not claimed as incident to arable land, it will be taken to be common appurtenant.

1741, 2.

MUSGRAVE
against
CAVE.

of the trespass, they plead that long before the time when the trespass is supposed to have been committed, and also at the said times when &c, *Peter Allen* Doctor of Divinity Dean of *Ely* and the Chapter of that church were seised in fee in right of their church of the manor of *Wentworth* with the appurtenances, and that they and all those whose estates they have and had in the said manor of *Wentworth* with the appurtenances, from time whereof the memory of man is not to the contrary, have used and enjoyed and have been accustomed to use and enjoy a fold course or common of pasture called *Gransdens* for 300 sheep, computing the hundreds by the greater hundred, that is to say, 120 sheep for every 100, amounting in the whole to three hundred and sixty sheep, in the said field called *Old Field*, whereof the said acre of land new assigned is and at the times when &c and time out of mind was parcel, except in their own lands there, every year in which the said field called *Old Field* or any part thereof was sown with corn from the time of cutting and carrying away the corn there growing until the said field or some part thereof hath been resown with corn, and every year when the said field hath been fallow for that whole year. And the defendants further say that the said fold course or common of pasture from time whereof the memory of man is not to the contrary hath been parcel of the said manor and demised and demisable by copy of the court rolls of the manor by the lords or their steward for the time being either in the whole or in parts and proportions in fee-simple or otherwise at the will of the lord according to the custom of the manor; and that the said Dean and Chapter being so seised before the said several times when &c viz. on the 27th of *October* 1732 at their court of the said manor held by *Samuel Gatward* their steward by copy of court roll according to the custom of the said manor did grant to *John Dowling*, gentleman, one fourth part of the said fold course or common of pasture, to hold the same to the said *John Dowling* his heirs and assigns at the will of the lord according to the custom of the manor; by virtue of which grant the said *John Dowling* was and is seised of and in one fourth part of the said fold course or common of pasture in fee at the will of the lord according to the custom of the said manor; and that he being so seised before the times when &c viz. on the 1st of *October* 1737 it was agreed between him and the defendant *Cave* that

that he the said *John Dowling* should and might feed and depasture ninety sheep of the said *Thomas Cave* in the said field called *Old Field* whereof &c at such times as he the said *John Dowling* had such right of fold course therein, and use and enjoy the said common of pasture there with the said sheep of the said *Thomas Cave* as long as both parties should please; by virtue whereof the said *Thomas Cave* and *Thomas Franklyn* as servants of the said *John Dowling* and by his command on the said 1st of *May* 1738 and at divers other days and times between that day and the second of *October* then next following (each of the said days and times being when the said field lay fallow) did enter into the said acre of land in which &c in order to put the said ninety sheep of the said *Thomas Cave* into the said field called *Old Field* to depasture the grafs then growing there and to use the said common of pasture, and did then put the said ninety sheep there for the purpose aforesaid; and the said sheep &c fed and depastured and trod down and consumed the grafs then growing there using the said common of pasture of him the said *John Dowling* there, as it was lawful for him to do; and the said *Thomas Cave* and *Thomas Franklyn* in so doing &c at the said times when &c did necessarily tread down and consume with their feet in walking a little of the grafs of small value then growing there, which is the same breaking and entering treading down and consuming &c in the said acre above new assigned; and this they are ready to verify &c.

1741, 2.
MUSGRAVE
against
CAVE.

To this plea the plaintiff demurs, and shews for cause of demurrer that it is not alleged in the said plea that the said fold course or common of pasture therein mentioned is appendant or appurtenant to the said manor, nor does it with sufficient certainty appear whether the said fold course or common of pasture in the said plea mentioned be common appendant appurtenant or in gross, or what other sort of right of common it is. The defendants join in demurrer.

And on this demurrer it comes now before the Court (a) for judgment; and the only question is whether this right of common insisted on by the defendants in their plea be well pleaded or not.

(a) The case was twice argued by *February* 1740, and on the 8th of *Fe-*
Boote, Serjt. for the plaintiff, and *Draper*, *bruary* 1741.
Serjt. for the defendants, on the 6th of

1741, 2.

MUSGRAVE
against
CAVE.

The objection set forth in the demurrer amounts to no more than this, that it does not sufficiently appear whether it be common appendant, common appurtenant, or common in gross, or what other sort of right of common it is; and if there were no other objection, we think that this admits of a plain answer.

It cannot be any other sort of common, because there are no other sorts of common of pasture but these three specified in the demurrer. For though common of vicinage has been mentioned, which is sometimes reckoned amongst the rights of common, there is properly no such right of common, but it is only an excuse for a trespass. If it were a right, it would prevent an inclosure, which (it has always been holden that) it will not. Vide *Co. Lit.* 122. a. (a).

The only question therefore is, if it sufficiently appear in the plea whether this be a right of common appendant, appurtenant, or in gross; and we think that it plainly appears to be common appurtenant.

It cannot be common appendant, because that can only belong to arable land; as is held in *Co. Lit.* 122. a. (b). It is of common right, and must be claimed in the waste of the lord. It is not for a certain number of cattle, but only for such as are levant and couchant on the land; and therefore it cannot be severed, not even for a moment, nor turned into common in gross. And the foundation of this right is that when a lord grants to his tenant arable land, he must have cattle to plough it, he must have cattle to manure it; and if he has only arable land, he must keep his cattle somewhere whilst the corn is growing, and therefore of common right if the lord hath any waste, he may put his cattle there. This therefore cannot be common appendant, 1st, Because it is not claimed as incident to arable land, but to the manor of *Wentworth*.

2dly, Because it is for a certain number of sheep, and not for such only as are levant and couchant.

(a) Per Powell J. in *Bromfield v. Karber*, 11 Mod. 73. And by such inclosure the common for cause of vicinage is gone. (b) See also *Bennet v. Reeve*, Mich. 14 Geo. 2. B. C. sup. 227.

3dly,

3dly, Because it is not claimed by a tenant in the waste of the lord, but by the lord himself in another man's soil.

4thly, Because, as it is laid to be demised and demisable time out of mind, it must have been enjoyed separately from the manor, and consequently from the estate to which it is said to belong, which common appendant cannot.

1741, 2.

MUSGRAVE
against
CAVE.

It was said by my Brother *Draper*, and it is certainly true, that no distinction is ever made in pleadings between common appendant and appurtenant, but the word "pertinent" is always made use of, and so it appears only from the nature of the common which is pleaded whether it be common appendant or appurtenant (a); as we think it plainly does in the present case.

It cannot be common in gross, because it is pleaded to be parcel of the manor, which common in gross cannot be (b).

It must therefore be common appurtenant; and so we think that there is no weight in the objection which is set forth in the demurrer.

But there was another objection made at the bar, which staggered us a good deal more, and which we thought at first very difficult to be got over: but upon further consideration we think that this likewise will receive a plain answer.

The objection is that this common cannot be parcel of the manor, and yet be demised and demisable by copy of court roll; because as soon as it is once severed by such demise and granted by itself without any land with it, it ceases to be part of the manor and so can never afterwards be granted again by copy; because nothing can be granted by copy but what is parcel of the manor. This is the strength of the objection.

To this it was answered that not only common but several other things merely incorporeal may be granted by copy of court roll; and several cases were cited to this purpose. In *Co. Lit.* 58. b. it is said that the herbage or vesture of land, underwoods, and whatever concerneth lands and tenements may be granted by copy of court roll. And he goes farther and says that a

(a) Vid. 4 Co. 38. a.

(b) Vid. *Day v. Spooner*, Sir Wm. Jen. 375; and *Cro. Car.* 432.

1741, 2.

MUSGRAVE
against
CAYE.

fair or market appendant to a manor may be granted by copy. In 1 *Rol. Abr.* 498, *A. pl.* 1. it is expressly said that tithes may be granted by copy of court roll (a): and though the contrary seems to have been determined in the case of *Sands v. Drury Cro. Eliz.* 814., yet that case when considered is a case of no great authority as to this point; first, because the Judges there were divided in their opinion as to this; for though they all agreed in the judgment, some of them went upon another reason, because it was not found in the special verdict that the tithes were demised by copy time out of mind; and *Popham J.*, who held that tithes were not demisable by copy went upon this reason, that they could not be parcel of a manor, which I shall shew by and by to be a mistake and that they may be parcel of a manor; and if so, his reason fails: and they all in that case agreed that common and prima vestura prati might be granted by copy. In the case of *Hoe v. Taylor, Moor* 355. it is held that underwood, tithes, a market, or piscary, may be granted by copy of court roll, if the custom will warrant it; and it is said there that the market of *Crockham* or *Crokenborn* in the county of *Somerset* has always been granted by copy. And the same is said in the same case, as reported in 4 *Co.* 30. b. 31. a.

I own that when these cases were first cited, I thought that they only meant that when copyhold land, to which common or any other profit is appurtenant, was granted by copy, the common or other thing appurtenant will pass with the land; and taking them in this sense, the cases cited would not at all help the present case, because here no land is granted, but only a bare right of common. But upon looking into the cases and considering them, I find that they go farther, and that the meaning of them all is that common, tithes, and the other things, may pass by copy of court roll by themselves without any lands.

What my Brother *Draper* said the last time plainly shews how this may be, and has removed all the doubts that we had in relation to this matter. For, as we are upon a demurrer, if this right of common as pleaded can be good upon any supposition whatsoever, we must take it to be so. Now supposing it to be, as my Brother *Draper* suggested, that *Old Field* was for-

(c) Vid. *Hargr. Co. Lit.* 38. b. n. 9.

merly part of the manor, and that the lord time before memory granted away *Old Field*, reserving common of pasturage therein for 360 sheep, this right, so reserved, will certainly remain parcel of the manor; as if the lord grant away his demesnes reserving a rent, this rent is undoubtedly parcel of the manor, as is held in 2 *Roh. Abr.* 120. *pl.* 4., who cites for this an old case in 22 *Aff.* 53. Nay, that book goes still farther; for in the same page, *pl.* 2. and 3. it is expressly held that feck rent may be parcel of a manor; as if the lord by his deed, whereby he reserves the rent, or by a deed subsequent, release all the services to the tenants, in which case the rent will undoubtedly become rent feck, yet it is parcel of the manor; for which also he cites the same book of affize, and also 31 *Aff.* 23, which case is much stronger than the present.

1741, 2.
MUSGRAVE
against
CAVE.

Taking it therefore that this common may be parcel of the manor, there is but one difficulty remaining, how it can be demisable by copy after it has been once so demised, because such demise severs it from the manor, and turns it into a common in gross; and so it ceases to be parcel of the manor, and if it ceases to be parcel of the manor, it can never be demisable again by copy. But there is a plain answer to this when the nature of the case is thoroughly considered. For if the lord by a common law grant had demised this common for years, though it had been holden as common in gross during the term, after the end of the term it would be common appurtenant and parcel of the manor again. And every copyhold, though of inheritance, is in the eye of the law considered only as a tenancy at will, and consequently a much less estate than that of a term of years. Though therefore it should be taken to be in gross during the estate of the copyholder, as soon as it comes again into the hands of the lord, it is common appurtenant again, and parcel of the manor as before.

This answer, if there were no other, would be sufficient to remove the objection. But I think that the matter may be carried still farther, and that it is common appurtenant even whilst it is enjoyed by the copyholder, for the same reason as copyhold lands are always considered in point of law as part of

1741, 2.

MUSGRAVE
against
CAVE.

and as the demefnes of the manor, even whilst they are enjoyed by copyholders of inheritance.

The case may be put in the same manner of tithes. Suppose a spiritual person lord of a manor and possessed of lands parcel of his manor which were tithe free in the hands of the lord, and that from time beyond memory he had granted away these lands reserving the tithes, the tithes in this case would remain parcel of the manor; and if the manor came to the crown on the dissolution of the monasteries and was afterwards granted by the crown to a subject, these tithes still remain parcel of the manor, and, if the custom will warrant it, may for the same reason be granted by copy of court roll. So a fair or a market appendant may be granted by copy, because a grant by copy to hold at the will of the lord according to the custom of the manor does not destroy the appendancy: but they remain still parcel of or appendant to the manor, notwithstanding such grant (a).

We think therefore that all the objections to this plea have received an answer.

We did not consult my Brother *Fortescue A.*, because he was not here when the case was argued: but my Brothers *Parker* and *Burnett* agree with me, for the reasons aforesaid, that the plea is good, and that judgment must be for the defendants."

(a) See *Doe d. Gibbons Bart. v. Pott*, Dougl. 709; and *Roe d. Hale v. Wegg*, 6 D. & E. 708.

1741, 2.

JOHN PARKHURST Esq., Sir JOHN FORTESCUE ALAND, Knight, and several others their Tenants, and the Tenants of Mrs. KATHERINE DORMER, against JOSEPH SMITH, Lessee of JOHN DORMER Esq.; in Error.

H. 15 G. 2.
Tuesday,
Feb. 23d.

THIS was an ejectment brought in the Court of King's Bench to recover the manor of *Sibdon* and other premises in the county of *Bucks* by *Joseph Smith* on three several demises made by *John Dormer*; the first on the 1st of *March* 1731 for twenty years from the 28th of *February* then last; the second on the 10th of *January* 1732 for eighteen years; and the third on the 20th of *November* 1735 for fifteen years.

Dom. Proc.

Limitation to A. for ninety-nine years if he so long live, "and from and after the death of A. or other sooner determination of the estate limited to A. for ninety-nine years then to trustees during the life of A. to preserve contingent remainders, and after the end or other sooner determination of the said term then to the first son of the body of A. in tail male," with divers remainders over: A. together with his son B. levied a fine and suffered a recovery, and both died;—held that the limitation to B. was a good limitation; that the limitation to the trustees was a vested remainder;

In *Michaelmas* term 1738 the cause was tried at the bar of the Court of King's Bench, when a special verdict was found, in substance as follows.

John Dormer Esq. and his son Sir *John Dormer* Knight and Baronet, (both since deceased) being seised of the premises in question by indenture of feoffment, 13th *August* 1662, between the said *J. Dormer* and Sir *J. Dormer* of the first part, *Susannah Browne* of the second part, Sir *R. Jenkinson* Bart. and Sir *William Child* Knight of the third part, and *J. Cave* Esq. and *T. Marriett* Esq. of the fourth part, in consideration of a marriage then intended to be had between Sir *J. Dormer* and *Susannah Browne*, and of 5000*l.* being her marriage portion, granted and enfeoffed the said manor &c to Sir *R. Jenkinson*, Sir *W. Child*, *J. Cave*, and *T. Marriett*, and their heirs, to the use of Sir *R. Jenkinson* and Sir *W. Child* and their heirs, to the intent to make them tenants of the freehold for suffering a common recovery to the following uses; ff. to the use of the said *J. Dormer* and his heirs until the marriage &c &c; (with divers remainders not necessary to be here stated) remainder to the said *J. Dormer* for his life; and after his decease "to the use and

that the freehold was in them at the time of levying the fine; consequently that the fine did not make a good tenant to the præcipe, and that the recovery did not bar either the remainder to B. or the subsequent remainders.

4 Bro. P. C. 405. 3 Atk. 135. S. C.

behoof

1741, 2.

PARKHURST
against
SMITH
Lessee of
DORMER;
in Error.

behooof of *Robert Dormer* (a), second son of the said *J. Dormer* and his assigns for and during the term of ninety-nine years, if the said *Robert Dormer* should so long happen to live; and from and after the death of the said *Robert Dormer* or other sooner determination of the estate therein limited to the said *Robert Dormer* for ninety-nine years as aforesaid then to and for the use and behoof of the said *Sir Robert Jenkinson* and *Sir William Child* and their heirs for and during the natural life of the said *Robert Dormer*, upon trust and confidence to support and preserve the contingent remainders uses and estates hereinafter limited from being defeated or destroyed, and for that purpose to make entries as occasion should require, nevertheless to permit the said *Robert Dormer* and his assigns to take the rents issues and profits thereof during the term of his natural life; and after the end or other sooner determination of the said term then to the use and behoof of the first son and issue male of the body of the said *Robert Dormer* lawfully begotten, and to the heirs male of the body of such first son lawfully issuing; and for default of such issue," to the use of all and every other son and sons of the said *Robert Dormer* severally and successively in tail male;

Remainder to *Fleetwood Dormer*, younger son of the said *John Dormer*, and to trustees to preserve contingent remainders, remainder to his first and other sons in the same manner as the same is limited in the case of *Robert Dormer*;

Remainder to all and every other son and sons of the said *John Dormer*, severally and successively in tail;

Remainder to the said *John Dormer* and the heirs male of his body;

Remainder to *Peter Dormer*, brother of the said *John Dormer* and his assigns for ninety-nine years, if he should so long live; remainder to trustees to preserve contingent remainders; remainder to his first and other sons in tail male;

With the like remainder to *Fleetwood Dormer*, another brother of the said *John Dormer*, and his assigns for ninety-nine years, if he should so long live, and to trustees to preserve contingent remainders, and to his first and other sons in tail male;

Remainder to *Bennet Dormer*, son and heir of *Euseby Dormer* deceased, who was the brother of the said *John Dormer*, and his

(a) Late one of the Justices of the Court of Common Pleas.

assigns for ninety-nine years, if he should so long live; remainder to trustees to preserve contingent remainders; remainder to the first and other sons of *Bennet Dormer* in tail male; and for default of such issue;

1741, 2.
PARKHURST
against
SMITH
Lessee of
DORMER;
in Error.

Then "to the use and behoof of *Euseby Dormer*, brother of the said *Bennet Dormer*, and nephew of the said *John Dormer*, for and during the term of ninety-nine years, if the said *Euseby Dormer* should so long happen to live; and from and after the death of the said *Euseby Dormer*, or other sooner determination of the estate herein limited to the said *Euseby Dormer* for ninety-nine years as aforesaid, to and for the use of the said Sir *Robert Jenkinson* and Sir *William Child* and their heirs for and during the natural life of the said *Euseby Dormer*, upon trust to support and preserve the contingent remainders uses and estates hereinafter limited from being defeated or destroyed, and for that purpose to make entries as occasion should require; nevertheless to permit and suffer the said *Euseby Dormer* to receive the rents issues and profits thereof to his own use during the term of his natural life; and after the end or other sooner determination of the said term then to the use and behoof of the first son of the body of the said *Euseby Dormer* lawfully begotten and of the heirs male of the body of such first son lawfully begotten; and for want of such issue," to the use of every other son and sons of the said *Euseby Dormer*, severally and successively in tail male, &c; with an ultimate remainder to the said *John Dormer* in fee.

On the 1st of *October* 1662 the marriage between Sir *J. Dormer* and *S. Browne* took effect; and in *Michaelmas* term 14 *Car.* 2. a recovery was suffered to the uses of the feoffment.

In *Easter* term 1726, 12 *Geo.* 2., the said *Robert Dormer*, who was then possessed of the premises in question under the above settlement for ninety-nine years determinable on his life, (all the preceding limitations in the settlement being determined,) and *Fleetwood* his only son levied a fine, and in the same term they suffered a recovery to the use of the said *Robert Dormer* in fee.

Afterwards in the lifetime of *Robert* (22d of *June* 1726) the said *Fleetwood* his only son died without issue.

1741, 2.
 PARKHURST
 against
 SMITH
 Lessee of
 DORMER;
 in Error.

On the 16th of September 1726 the said *Robert Dormer* died, in possession of the premises, without leaving any male issue, but leaving four daughters, *Mary Dormer*, *Elizabeth* the wife of Sir *J. Fortescue Aland*, *Ricarda* the wife of the said *John Parkhurst*, and *Katherine Dormer*, who on their father's death entered on the premises in question, and in *Easter* term 1730 they with the husbands of the two who were married levied a fine.

On the 3d of September 1729 *Euseby Dormer* (the nephew of *John Dormer* the settlor) died, leaving a son *John Dormer*, the lessor of the plaintiff, who (the intermediate remainders in the settlement of 1662 being spent) made five several actual entries (a) upon the premises, claiming title; viz. 6th January 1731, 6th October 1732, 1st January 1732, 5th October 1733, and 10th November 1735.

The jury found the last demise laid in the declaration, on the 20th of November 1735; but submitted whether &c.

This special verdict was twice argued in the Court of King's Bench, where judgment was given for the plaintiff (b), to reverse which a writ of error was brought; and the case having been argued at the bar of the House of Lords, these two questions were proposed to the Judges,

First, Whether the remainder limited to the first son of *Euseby Dormer* were or were not good in its original creation?

Secondly, If good, whether it were well barred by the fine levied by Mr. *J. Dormer* and his son *Fleetwood*, and the recovery suffered by them?

(a) A former ejectment had been brought by Mr. *Dormer*, the present lessor of the plaintiff, in the name of *Berrington*; but the demise in the declaration being laid on a day before he had made an actual entry, it was holden first in this Court (vid. *Berrington* d. *Dormer* v. *Parkhurst*, 2 Str. 1085, and *Andr.* 125.) and afterwards in the House of Lords (vid. 4 Bro. Parl. Cas. 353.) that the plaintiff could not recover, for that an actual entry is necessary to avoid a fine, and the fictitious entry in an ejectment is

not sufficient; that the actual entry in this case subsequent to the lease in ejectment would not make it good by retrospect; and that no ejectment could be brought or lease made without a precedent actual entry. On this point, see also *Tapner* d. *Peckham* v. *Merlott*, T. 12 & 13 Geo. 2. sup. 182, 183. and the cases there referred to.

(b) Vid. 7 Mod. 366. oct. ed. and 18 Vin. Abr. 413. pl. 8. But see *Fearne's Cont. Rem.* page 333, &c, where he points out an inaccuracy in that report.

And

And on this day the unanimous opinion of the Judges was delivered by

Willes, Lord Chief Justice, as follows,

"In a case of so much nicety as the present, and which has been so elaborately spoken to at the bar, though we are all of the same opinion, your Lordships will (I believe) expect that I should not only give your Lordships our opinions, but likewise the reasons on which they are founded; and I shall endeavour to lay them before you in as few words and in as clear a light as the nature of the thing will permit.

As this question arises on the settlement dated 13th of *August* 1662, which I shall have occasion frequently to have recourse to, I shall beg leave to state the words of that settlement, on which the question depends.

The settlement was made by *John Dormer* father of the late Mr. Justice *Dormer* on the marriage of his eldest son Sir *John Dormer*, and after several limitations in favor of Sir *J. Dormer* and his issue male, the estate in question is limited to the use of the late Mr. Justice *Robert Dormer* (second son of the grantor) "for and during the term of ninety-nine years, if he should so long happen to live, and from and after the death of the said *R. Dormer* or other sooner determination of the estate therein limited to the said *R. Dormer* for the term of ninety-nine years, then to and for the use of two trustees and their heirs for and during the natural life of the said *R. Dormer*, upon trust and confidence to support and preserve the contingent remainders uses and estates thereafter limited from being defeated or destroyed, and to that purpose to make entries as occasion should require, nevertheless to permit the said *R. Dormer* and his assigns to take the rents issues and profits thereof during the term of his natural life; and after the end or sooner determination of the said term, then to the use of the first son and issue male of the body of the said *Robert* lawfully begotten, and to the heirs male of the body of such first son lawfully issuing; and for default of such issue to the use of all and every other son and sons of the said *R. Dormer* severally and successively in tail male;" and after several limitations in like manner to another son and the brother of the said *John Dormer*. There is a limitation to *Euseby Dormer*, father of the lessor of the plaintiff, and his issue male, exactly in the same words as in the limitation before to Mr. *J. Dormer*

1741, 2.

PARKHURST
against
SMITH
Lessee of
DORMER;
in Error.

1741, 2.

PARKHURST
against
SMITH
Lessee of
DORMER;
in Error.

Dormer and his issue; with a remainder to the heirs of the body of *John Dormer* the grantor; and the last remainder is to him in fee.

Having stated the material parts of the settlement, before I consider the two questions distinctly, I shall beg leave to take notice of some general rules very applicable to the present case. It is a known maxim in law, that *benignæ faciendæ sunt interpretationes chartarum ut res magis valeat quam pereat*. There is another that *verba intentioni et non e contrà debent inservire*. It is said in our books that the construction of deeds ought to be favourable, and as near to the apparent intent of the parties as possibly may be and as the law will permit. That too much regard is not to be had to the natural and proper signification of words and sentences to prevent the simple intention of the parties from taking effect; for that the law is not nice in grants, and therefore it doth often transpose words contrary to their order to bring them to the intent of the parties. For neither false *Latin* nor false *English* will make a deed void, if the intent of the parties doth plainly appear. I have collected these rules and maxims from *Littleton*, *Plowden*, *Coke*, *Hobart*, and *Finch*, persons of the greatest authority. But they are themselves so full of justice and good sense, that they do not want any authority to support them, and I do not know that they were ever yet controverted.

On the foundation of these rules, whenever it is necessary to give an opinion upon the doubtful words of a deed, the first thing we ought to inquire into is, what was the intention of the parties. If the intent be as doubtful as the words, it will be of no assistance at all. But if the intent of the parties be plain and clear, we ought if possible to put such a construction on the doubtful words of a deed, as will best answer the intention of the parties, and reject that construction which manifestly tends to overturn and destroy it. I admit that though the intent of the parties be never so clear, it cannot take place contrary to the rules of law, nor can we put words in a deed which are not there, nor put a construction on the words of a deed directly contrary to the plain sense of them. But where the intent is plain and manifest, and the words doubtful and
obscure,

obscure, it is the duty of the Judges (and this is that *Asludia* which is so much commended by Lord *Hobart*, p. 277. in the case of the Earl of *Glanrickard*) to endeavour to find out such a meaning in the words as will best answer the intent of the parties.

1741, 2.
 PARKHURST
 against
 SMITH
 Lessee of
 DORMER;
 in Error.

In order therefore to see what construction is to be put on the words of this deed, I will in the first place inquire what was the intent of the parties, whether it is doubtful or clear and plain, and if plain what the intention was? And we think that nothing can be more plain than that the intent of the parties was that the estate should be continued in the name and blood of the *Dormers*, and that it should go to the heirs male of the family, and that the trustees to preserve contingent remainders were inserted for the purpose of preventing any alienation by any of the persons in the settlement as far as the rules of law would permit. To say, as was said by the counsel for the appellants, that it was the intent of the parties that the first tenant for 99 years and the first remainder-man in tail when he came of age should have it in their power to bar all the remainders, and that the trustees were appointed only to preserve the estate to the first son of *Robert*, is we think without any foundation. If this had been the intent of the parties, *R. Dormer* would have been made tenant for life; for in that case it would not have been in his power without the trustees to have barred his first son, but he and his son when of age might have barred all the remainders. But he was made only tenant for 99 years for this reason, that he together with his son when he came of age might not have it in their power to bar the remainder-men, and to prevent this very thing being done which is now contended for by the appellants. For as by the rules of law, in order to prevent perpetuities, an estate for life only cannot be limited to a person not in being, this method was invented to prevent the alienation of the first son as far as the rules of law will permit, which is during the life of his father. It was said that there was no occasion to put this construction upon it, there being trustees appointed after every limitation for 99 years, to protect the respective remainders depending on those estates. But this is plainly otherwise, for the words of the trust are to support and preserve *the contingent remainders, uses, and estates thereafter limited*, and not only the remainder limited to *the first son of Robert*. Remainders are limited

1741, 2.
 PARKHURST
 against
 SMITH
 Lessee of
 DORMER;
 in Error.

to every one of the sons of *Robert*, and it was certainly the intent of *John* the donor that every one of them should be protected as well as the remainder to the first son of *Robert*. But these remainders, and the limitations to the other remaindermen, and even that to *Euseby* himself, might be defeated, if their construction were to take place, as appears from the present attempt. For the subsequent trustees after the limitation to *Euseby* could only protect remainders limited to his sons against the alienation of the father, if ever he should come into possession, but were no security at all against any alienations which might be made by *Robert* and his eldest son.

Having thus shewn what was the plain intent of the parties, I shall now come directly to the two questions. As to the first, it was (as I am well informed) never mentioned till the last argument, and shews I think only this, what the wit of man can do when it is employed in making objections. For there never (I think) was less foundation for any objection than this, That this remainder to the first son of *Euseby Dormer* was not good in its original creation, and if it should prevail, it would destroy the whole intent of the parties, and overturn the whole settlement except the first limitation to Sir *J. Dormer* for 99 years; and surely this would be *maledicta expositio*. But to make out this point the counsel for the appellants insisted on these things;

1st, That the contingencies, on which the estate is limited to the son of *Euseby*, are the same on which it is before limited to the trustees, and it is a rule of law, that where there are two clauses in a deed repugnant to each other, the first shall be received, the latter rejected; consequently the remainder limited to the first son of *Euseby* is void.

2dly, Though the word "end" in the limitation to the son of *Euseby* should be construed to mean the death of *Euseby*, it will likewise be void, because though no estate was before limited to the trustees after the death of *Euseby*, it is limited after the determination of his estate, which is one of the contingencies on which the estate to the sons of *Euseby* is limited; and where an estate is limited to a person on two contingencies and the one is repugnant and void, the estate can never take place.

Now both these objections are founded on a supposition that the word *term* in the limitation to the son of *Euseby* means the
estate

estate before limited to Euseby, which we think it does not, and if not, these objections fall to the ground.

For first, we think it may well relate to *the estate limited to the trustees during the life of Euseby*; and then all will be very consistent. That is, the son of *Euseby* is to take after the end of their estate, which is after the death of *Euseby* or other sooner determination thereof, that is to say, if they should do an act which amounts to a forfeiture, which to be sure they may do. And that "term" may signify an estate for life or years, though not so properly as the limitation of time for which an estate is granted, is said in *Co. Lit. 45. b.* and several other books; and it is frequently made use of in this sense even in common parlance. But if it be taken to signify the limitation of time, it must relate to the term of the life of *Euseby*, that being the last term before mentioned, and *relatum refertur proximo antecedenti*; and then it is certainly good as to the first contingency after the end of the term which is his death. And the words *other sooner determination* must be rejected as words frequently are which are put in *currente calamo*, and can have no signification, or perhaps they might be copied from some old precedent before the Reformation, when these words were put in, because at that time a man professing himself a Monk might be dead in law, though living, and his heirs might enter as if he were actually dead, and administration might be granted by the ordinary. It seems to be a pretty strained construction to refer the words *said term* to the estate of *Euseby*, because it is mentioned at a great distance in the sentence, and it is in no part of the sentence called a term. But supposing it did relate to that estate, there would still be as little in the objection, for there is no repugnancy, there being no estate limited to the trustees after the death of *Euseby*. So that the estate to the son may take place after his death, and the words *other sooner determination* be rejected; and then these two estates will not commence together, but at different times.

As to what was said that if an estate were limited on two contingencies and one is repugnant the limitation is void, it is too absurd to deserve an answer. But as it was endeavoured to be supported by a case, I shall take notice of that case. The case cited to support it was the case of *Comberford v. Birche*, 2 Lev. 157: but that has no resemblance to this case, for there an estate was first limited to trustees for 21 years, and then in
case

1741, 2.

PARKHURST
against
SMITH
Lessee of
DORMER;
in Error.

1741, 2.

PARKHURST
against
SMITH
Lessee of
DORMER;
in Error.

case none of the brothers or sisters of the grantor or any of their children were living immediately or after the expiration of the term to his brothers and sisters in tail male, and in default of such issue remainder to the lessor of the plaintiff. There were sisters living, and a child of one of the brothers, and so adjudged that the remainder could not take place. Certainly the limitation to the brothers and sisters in that case, after they were all dead, was absurd and ridiculous: but the case did not at all turn upon that, but as the remainder-man was to take nothing till the brothers and sisters were all dead, and their children and some of them were then living, nothing was more plain than that the remainder-man could take nothing till their deaths. I beg leave only to put one case to shew the absurdity of this notion, and then shall conclude this point. Suppose *A.* should grant an estate to *B.* during his life, remainder to *C.* during the lives of *B.* and *D.* or the survivor of them, would any one say the remainder would be void because he would never take during the life of *B.*, there being an estate before limited to him during his life? But he would certainly have an estate after *B.*'s death during the life of *D.*, if he survived. But if what is contended for by the appellants be right, he would not, but the remainder would be void. For these reasons we are of opinion that the estate limited to the first son of *Euseby* was good in its first creation.

As to the second point, it depends on two questions;

1st, Whether the freehold were in the trustees at the time of the fine?

2dly, If it were, whether notwithstanding this the fine did not make a good tenant to the precipe?

To shew that the freehold was not in the trustees, the counsel for the appellants insisted on three things;

1st, That the estate limited to the trustees is void.

2dly, That if it were not void, it was but a contingent remainder and so not vested.

3dly, That in their opinion it was no estate at all, but only a right of entry.

The first objection was founded on these words, whereby the estate is limited to them after the death of *Robert* during his life, and may receive this plain answer, that if it were limited to

them

them on no other contingency, it would certainly be so, but as it is limited likewise upon any *other sooner determination of the estate*, and the estate may determine by three other ways, by effluxion of time, surrender, or forfeiture, it is certainly good, if it determine either of these three ways.

1741, 2.
PARKHURST
against
SMITH
Lessee of
DORMER;
In Error.

As to the second objection that the trustees had only a contingent remainder, and consequently that it was not vested at the time of this fine levied, it deserves a little more consideration. The strength of the argument is this. A contingent remainder does not vest till the contingency happens, but in the mean time the estate vests either in the heir or the next remainder-man. This is a contingent remainder, and the contingency had not happened at the time of the fine levied, consequently the remainder was either in *Robert Dormer* as heir of the body of *John*, (to whom there is a limitation in the settlement,) or in *Fleetwood* as the next remainder-man, and if it were in either it must be agreed that the fine was well levied, and made a good tenant to the præcipe. We admit all these positions but one, but it is upon that one that the whole depends, and that is, we deny *that this estate so limited to the trustees was such a contingent remainder that it did not vest immediately*. The notion of a contingent remainder is a matter of a good deal of nicety, and if I should trouble you with all that is said in the books concerning contingent remainders and the instances that are put of such contingent remainders I am afraid it would rather tend to puzzle than enlighten the case. I choose therefore to tell your Lordships what are the contingent remainders that do not vest, and what remainders vest immediately, though they are sometimes (though very improperly) called contingent remainders. The definition which was given by the counsel for the appellants of a contingent remainder which does not vest is "where the particular estate may determine before the remainder can take place in possession, and that if it is uncertain when it will take place in possession and it may happen that it never will take place in possession, the remainder will not vest." But this is not a just definition; for if this were true, it would overturn all the settlements that ever were made. I will mention but one instance, though I might mention a thousand; as where an estate is limited to *A.* for his life, remainder to another and the heirs of his body; I believe no man in his senses ever doubted but this was a vested remainder; and yet it is within

1741, 2.
 PARKHURST
 against
 SMITH
 Lessee of
 DORMER;
 In Error.

their definition; for suppose the remainder-man in tail dies without issue before the tenant for life, then this remainder will never take place in possession.

As therefore this is not a proper definition, we beg leave to acquaint your Lordships what we think is: and we think there are but two sorts of contingent remainders which do not vest;

1st, Where the person to whom the remainder is limited is not in esse at the time of the limitation;

2dly, Where the commencement of the remainder depends on some matter collateral to the determination of the particular estate.

Many instances of such contingent remainders might be put which will fall under one of these heads, and I will beg leave to put one of each the better to illustrate this matter. If the first limitation be to one for life or for years, and the next limitation to the son of *B.* who at the time has no children, this is a contingent remainder of the first sort. If there be a limitation to *A.* for life, remainder to *B.* after the death of *J. S.*, or when a third person then at *Rome* returns from thence, this is a contingent remainder of the second sort. In the first case, if the tenant for life should die, or the term for years expire, before *B.* has a son born, the remainder never vests at all. And in the second case, if *B.* dies before *J. S.*, or before the man returns from *Rome*, the remainder never vests, because the death of *J. S.* or the return of the person from *Rome* were both conditions precedent. And these are instances, amongst many others, of contingent remainders which do not vest, and of which you may find great variety in *Boraston's* case, 3 *Coke* 20. But the present limitation to the trustees plainly does not fall under either of these heads. The trustees were persons in being, and their estate was not to commence on any collateral matter, but upon all determinations of the estate of *Robert Dormer* which could happen during his life, and the estate was limited to them for no longer time. To enforce and illustrate this I beg leave to mention two or three other things. Will any one say that any thing can descend to the heir that did not vest in the ancestor; so that if nothing vested in the trustees, the limitation to them and their heirs is nonsensical. For according to this notion, if they should die before the contingencies happen, their heirs can take nothing, and yet this word "heirs" has been put in every such limitation for 200 years last past, for it is so long since

since the statute of Uses; so that during that time we have been all in the dark, and this new light is but just sprung up, which if it prevail, for another reason as well as this, will overturn all the settlements for 200 years last past. For in every one of them the limitation is either in the same words as the present, or *after the end or other sooner determination of the particular estate*, which are words tantamount to this; for *end or determination* certainly comprehends *death as well as effluxion of time*. If therefore I could not make this consistent with the rules of law, though I humbly apprehend I plainly have, I should rather choose to put a construction on these words contrary to the rules of law, than overturn many thousand settlements, according to this maxim founded on the best reason, *communis error facit jus*, and *ut res magis valeat quam pereat*. But the present case for the reasons I have already mentioned is not, I think, liable to this objection; to prove which I beg leave only to put one case. *A.* tenant in fee grants an estate to *B.* for 99 years determinable on his life; supposing *B.* outlive the term, or surrender, or forfeit, no one I believe will say but that *A.* may enjoy the estate again. If so a contingent freehold was in him during the life of *B.*; for it could not be in *B.*, because he had only a chattel interest; and it could not be in any one else. And if it were in *A.*, it must be a vested interest, for it was never out of him. And if *A.* had a contingent freehold during the life of *B.*, no one can say but that he might grant it over, and if he do it must be of the same nature it was when it was in *A.*, and consequently a vested freehold. And this case I have put is expressly held to be law in *Co. Lit.* 42. a. in *Cholmley's* case 2 *Co.* 51. a., and in the Year Book of *Edw.* 3. which is there cited. I shall conclude this head with the case of *Elie v. Osborn*, 2 *Vern.* 754, which was cited as an authority by the appellants. It was cited by them to prove that if such trustees join with the tenant for years and the next in remainder to bar the other remainders, it was not a breach of trust: but as to this point it is but a slender authority; 1st, Because though Lord *Cowper* was a very great man, other Chancellors as great as he have been of another opinion. 2dly, Because in this case there was no remainder but to the heirs of the body of the tenant for years and to his own right heirs, and a fine only by him without the trustees would have barred them by way of estoppel.

But

1741, 2.
 PARKHURST
 against
 SMITH
 Lessee of
 DORMER;
 In Error.

1741, 2.
 PARKHURST
 against
 SMITH
 Lessee of
 DORMER;
 in Error.

But though I think it a very slender authority as to the point for which it was cited, I think it an authority in point for the respondents; because it is expressly laid down for law in that case, that though the remainder to the trustees was limited to them by words exactly tantamount to the present, yet that the freehold was vested in them during the life of the tenant for years. And therefore I shall leave this point upon this case and what I have before said.

Third point; as to its being barely a right of entry: as I believe this was never before said, as it is contrary to common sense and all the notions of the law, I am almost ashamed to answer it, but as it was so strongly insisted on, your Lordships will forgive me if I say a word or two upon it. It was said that though it were only a right of entry, yet the trustees might enter for the forfeiture, which they could not do, unless they had an estate; for a forfeiture is on a condition annexed to the estate, for which a right of entry cannot be reserved to a stranger, for this plain reason, because if he should enter, what estate must he have? This I always thought to be undoubted law, but a case is cited to the contrary, which was the case of *Jemot v. Cowley*, 1 Saund. 112. which is thus stated there; *A.* being seised in fee of lands granted a rent-charge in fee out of them, and also granted that if the rent should be in arrear the grantee his heirs and assigns might enter on the lands and hold them until he or they should be satisfied for the rent; the rent was in arrear; then the grantee entered and made a lease to the plaintiff who brought ejectment; and upon a special verdict it was adjudged by the whole Court that the grant was good, and that the grantee by entry had such an estate that he might make a lease to the plaintiff to enable him to maintain an ejectment. And so the plaintiff had judgment, which was affirmed in the Exchequer Chamber. I am not quite satisfied that that case is law (a): but if it be, it is nothing to the present case; for the judgment must be founded upon this reason, that the words in

(a) Sir T. Raym. 135, 158; 1 Sid. 223, 262, 344; and 1 Leod. 170; particularly the latter, where this case is more fully reported; according to which it appears that the case was argued at three several times, and that the Court in giving judg-

ment relied on the cases of *Edgar v. Molins*, Tr. 14. Car. 2. C. B., and *Haverhill v. Hare*, Cro. Jac. 510. See *Haffell d. Hodgson v. Gouthwaite*, post.—See also *Harg. Co. Lit.* 203. a. note (3).

the grant were sufficient to give the grantee an estate in the land on a condition precedent, viz. the non-payment of the rent. A case in *Dyer*, 340. and another in 1 *Co.* 1. 127. *b.* *Chudleigh's* case, were likewise mentioned. That though in a feoffment to uses, where the whole use is limited, and consequently the whole estate is out of the feoffees, yet upon some contingencies to prevent the destruction of the uses and ut res magis valeat quam pereat, a scintilla juris to enter and preserve the uses should be considered as remaining in the feoffee. This was a great stretch in the court and a commendable astutia to invent a method to prevent the statute of uses working a wrong and overturning the intent of the parties. It is strange therefore to apply this to the present case, and to say this ought to be done contrary to the known rules of law, in order to do wrong and overturn the intent of the parties.

But there still remains something to be considered, and that is whether the fine levied by *Robert* and *Fleetwood* might not make a good tenant to the præcipe, though the freehold were in the trustees. That it could not, as the fine of *Fleetwood*, seemed in great measure to be admitted; and to be sure it could not. For a fine by him in the reversion, who could not make a feoffment, could not be considered as a feoffment; and the whole argument was founded upon that. And to be sure if the fine amounted to a feoffment, it would give the conusee a freehold by wrong, which is sufficient to support a recovery, if the trustees did not enter and avoid the feoffment before the recovery suffered, as they did not in the present case. The whole question therefore depends on this, whether the fine by tenant for years was a feoffment or not. It was urged by the counsel for the appellants that a fine is a feoffment on record, and many cases were cited which I shall not particularly enumerate, as there has been no judicial determination, and as they are all founded on *Co. Lit.* 10. *a.*, where he says peremptorily that a fine is a feoffment of record. He was so very great a man that unfortunately all his dicta (though some of them when they come to be thoroughly examined by those who are nullius in verba magistri will be found not to be right) have passed for law ever since.

But in opposition to his authority I shall beg leave to mention,

1741, 2.

PARKHURST

against
SMITH
Lessee of
DORMER;
in Error.

1741, 2.

PARKHURST
against
SMITH
Lessee of
DORMER;
in Error.

1. The reason of the thing;

2dly, The opinion of some great lawyers of late;

3dly, An authority as great as his own directly contrary to his.

1. As to the reason of the thing. A feoffment operates in the strongest manner, because of the notoriety of the livery. If a fine be a feoffment, it is so before the proclamations, and yet till then it is as clandestine as any kind of conveyance whatsoever. If a feoffment were made, the trustees might immediately enter and avoid it: but a fine being a discontinuance they can only do it by action. What therefore seemed to be admitted is not so, that Mr. J. *Dormer* might have done this by feoffment. He might indeed, if the trustees had stood still; but if they had entered immediately, they would have avoided it. Whereas if a fine be a feoffment, it cannot be avoided but by action, and before that could have had its effect, the recovery would have been suffered and all over. Besides a fine may be of tithes, and of a remainder, of which there can be no feoffment, and yet in each of them it is said, *come ceo que il ad de son done*; for though *done* may signify a feoffment, yet it signifies many things besides, as is said by *Coke* himself, *Co. Lit. 9. a.*

2. To get off this absurdity Lord Chief Justice *Holt* and Lord *Macclesfield* both great men, in the case of *Hunt* and *Bourne* (a), and in the case of *Carter* and *Barnadiston* (b), held that it only presupposed a feoffment in such cases where the party levying the fine had such an estate that he might properly make a feoffment, as not caring directly to deny the authority of Lord *Coke*. But I think, if it were material, I could prove that it does not even presuppose a feoffment: but admitting that it did, it will not help the present case, because that supposition will only be evidence against persons parties to the fine; for it would be no more, even though a feoffment found on a special verdict.

Lastly; I promised to cite an authority as great as Lord *Coke* himself to the contrary, and I mean his own. For though in *Co. Lit. 10. a.* he says that "a fine is a feoffment of record," yet in the page before 9. a, are these words, "A feoffment is the most antient and most necessary conveyance, both for that it is

(a) *Salk.* 339. But there the Court denied a fine to be a feoffment of record.

(b) 1 *P. Wms.* 519.

solemn and public, and also for that it cleareth all disseisins, abatements, intrusions, and other defeasible estates, which neither a fine recovery nor bargain and sale by deed indented and inrolleth do." If this be so, a fine is not a feoffment; and here I will leave this assertion of his, that a fine is a feoffment of record. That a fine levied by tenant for years is void against all strangers, and that they may plead partes finis nihil habuerunt is said in every book which speaks of it; and therefore I shall mention no other cases than 5 Co. 124, *Saffyn's case*; 3 Co. 78, *Fermor's case*; and *Hard. 400*; where it is expressly so adjudged, because of the imbecillity of the estate, but it is said that though it was admitted to be void against strangers, yet it was good against himself and those who claimed under him, and so not absolutely void; for if it were so, how could it be void and a forfeiture at the same time. If there were any thing in this argument, it proves nothing in the present case, because it must be admitted that the lessor of the plaintiff is a stranger to the Fine. And that it may be void as to him and yet a forfeiture at the same time, I beg leave to mention the common case of a copyholder; if he make a common law grant of his estate, it is good against all persons but the lord: but it is void as to him, and yet a forfeiture. For the bare attempt only to do a wrongful thing creates a forfeiture, which is exactly parallel to the present case.

I beg your lordships' pardon for taking up so much of your time, and will add nothing more but that we are all unanimously of opinion that the lessor of the plaintiff's estate was good in it's first creation, and that it was not barred by the fine and recovery (a)."

1741, 2.
PARKHURST
against
SMITH
Lessee of
DORMER;
in Error.

(a) Lord *Hardwicke* Chancellor afterwards decreed that the defendants should account with the lessor of the plaintiff, Mr. *Dormer*, for all the rents and profits of the estates from the time when his title first accrued, *sc.* from his father's death, even for those that accrued before he made

an actual entry to avoid the fine. *Dormer v. Fortescue*, 3 Atk. 124. But, in a court of law the party can only recover the profits that accrued after such actual entry. *Compere v. Hicks*, 7 D. & E. 727.

1742.

Trib.

16 Geo. 2.

Monday

July 5th.

A tenant in
formedonmay pray a
view either
before or af-
ter the de-
mandant has
counted.But he is
not entitled
to a view
where it is
clear that he
knows what
lands are
demanded.It is no bar
to a view to
counterplead
that the te-
nant is in ac-
tual possession
of the lands
demanded
without add-
ing "and
of no other
lands in the
same vill"
&c.SUSSANA DAVIS *against* REBECCA LEES.

THE opinion of the Court was thus delivered by

Willes Lord Chief Justice. "This comes before the court on a formedon in remainder, in which the tenant *Rebecca Lees* has cast nine essoigns; and then after the ninth essoign comes and prays a view in these words; "At which day, to wit, on the morrow of *St. Martin* comes the said *Susanna* by her attorney aforesaid, and offers herself the fourth day against the said *Rebecca* in the plea aforesaid; and the said *Rebecca* by *W. Burk* her attorney comes and prays view of the tenements aforesaid with the appurtenances whereof &c."

Then the plaintiff counterpleads; "And hereupon the said *Susanna* prays leave to counterplead the said view here until the octave of *Saint Hilary* &c. At which day here comes as well the said *Susanna* by her attorney aforesaid as the said *Rebecca* by her attorney aforesaid, and the said *Susanna* as to the demand of the said *Rebecca* to have view of the tenements aforesaid with the appurtenances saith that the said *Rebecca* ought not to have view of the same, because she says that the said *Rebecca* at the time of suing forth the original writ of her the said *Susanna* in this behalf and long before was and now is in the actual possession of the tenements aforesaid with the appurtenances in the said writ mentioned, to wit at *Barlow* aforesaid; And this she is ready to verify; wherefore she prays judgment whether the said *Rebecca* ought to have view of the tenements aforesaid &c."

To this the tenant demurs generally, and prays judgment and a view of the said tenements with the appurtenances to be adjudged to her &c.

Two objections have been made (a);

First, That the tenant comes too early, for that she ought not to come before the demandant hath counted; and

2dly, That the tenant is not entitled to a view at all in this case.

(a) This case was argued on the 25th of June in the same term by *Booth* Serjt. in support of the demurrer, and *Willes* King's Serjt. contra.

As to the first objection; it is attempted to be supported by *Booth* on real actions, p. 37; where he says, "In most real actions *after* the demandant hath counted the tenant may demand a view;" from whence it has been inferred that he cannot demand a view before, though it is not expressly said so. But he cites no case for this, but only a law dictionary. The same book likewise says, p. 42., that when a view is returned by the sheriff the demandant must *count de novo*, which, as has been insisted, implies the same thing. But this is only the saying of *Booth* himself, and he cites here no authority at all. But there is a book of good credit, where the same thing is said, and that is *Practica Wallia* p. 23. The words are "*after declaration* is put in and a rule given to answer, the tenant may demand view of the lands, which must be done in Court or office before the rule is quite out." And it is there also said that after the writ of view the demandant must declare *de novo* by a *similis narratio*. But we think that both these authors are mistaken, and that the tenant may demand a view either before or after the count.

1742.

DAVIS
against
LEES.

That the tenant may have a view *after the demandant has counted* appears not only from the books already mentioned, but likewise from several precedents in the books of entries; nay it has been holden that he may demand a view even after a general imparlance, as appears by *Dyer* (a) 210. b., though he is of a contrary opinion, and it is likewise said in *Practica Wallia*, in the place before cited, that he cannot. But, be this as it will, it plainly shews that a view may be demanded after the count. And I believe it usually was so, because the tenants generally stayed as long as they could before they demanded a view, that they might delay the demandant the longer. On the other hand if it may be, I think we ought not to discourage those who demand a view before count, both because there are dilatories enough in these sort of actions already, and because wherever it is after a count the demandant must count *de novo* by a *similis narratio*; so that the first count seems to be to very little purpose.

(a) In the case cited from *Dyer* 210. b. | though the prothonotary and the clerks
it is stated to have been the opinion of the | thought otherwise.
Court that he should *not* have a view,

1742,

DAVIS
against
LEES.

And that there may be a view *before count* is plain from an ancient book and of very great authority, I mean *Glanville de Legibus*, l. 2. c. 1, 2, and 3.—C. 1. Utroque autem litigantium præfente in curiâ et petente clamante tenementum petitem, poterit tenens petere visum terræ. Sed ad hoc, ut detur ei inde respectus, distinguitur utrum is qui tenet habeat plus terræ in villâ illâ ubi terra illa quæ petitur est, an non. Et si plus ibidem non habuerit, nulla dabitur ei inde dilatio: sin autem plus terræ ibi habuerit, tunc dabitur ei inde respectus, et alia dies ei ponetur in curiâ; et cum ita recessum fuerit a curiâ, ad tria effonia rationabilia poterit tenens recuperare de novo, et præcipietur vicecomiti illius provinciæ ubi tenementum illud est quod mittat liberos homines de comitatu suo ad videndam terram illam per hoc breve;—C. 2. “Rex vicecomiti salutem &c &c”—C. 3. “Post tria effonia rationabilia visum terræ comitantia, utroque litigantium iterum apparente in curiâ, petens ipse loquelam suam et clameum ostendat in hunc modum &c.”—In *Bro. Abr.* tit. “View,” pl. 99. it appears that on a writ of entry the tenant demanded a view *before* the count; and it plainly appears by the book that such demand was regular, and that he may either demand it before or after count. In *Hearne’s Pleader* fo. 527. (as cited by the counsel, but it is properly p. 464, for the book is mispaged (a) in *Formedon*) there is an entry of a view had before the count; for the view is prayed *M. 32 & 33 Eliz.* and the declaration is *33 & 34 Eliz.*; and it appears there that the tenant prayed a view upon his first appearance after the last effoign, as she does in the present case. See also *Rast. Entr.* 376. a. pl. 2. & 3; *Clift’s Entr.* 358. In the case of *Sleigh v. Chetham* and wife in *Lutw.* 849 b. in *formedon*, it appears that the writ of view was teste’d on the 27th of *April 33 Car. 2.* and that the demandant did not count until *Hil. 33 & 34 Car. 2.*; so the view must have been prayed before the count. And in *Co. Entr.* 331. b. in *formedon* the view was certainly before the count, though the entry there is a little particular; for after the last effoign when the tenant appears, it is entered that the demandant ad tunc petiit versus tenentem tenementa prædicta ut jus suum per dictum breve dominæ reginæ de formâ donationis in remanere &c; which can never be taken to be a count, for

(a) But though there is a chasm in the former pages of this book, the reference in question is in the printed page 527.

the count afterwards fills nearly four columns, but it seems to mean no more than what is said in the present case, that on the appearance of the tenant *the demandant offered herself against the tenant in the plea aforesaid*, and seems to be agreeable to what is said in *Glanville*, *utroque autem litigantium præsente in curiâ, et petente clamante tenementum petitum, tenens petit visum*. It appears likewise plainly from the case of *Wickham v. Enfield* and wife *Cro. Car. 351*. that the view there, which was in dower, was before the count. We think therefore that there is no weight in the first objection, but that the tenant may pray a view either before or after the demandant hath counted.

1742.

DAVIS
against
LEES.

Secondly ; As to what is insisted in the counterplea, we think likewise that it is not sufficient to bar the tenant of her view.

We agree that the exceptions specified in the statute of *Westm. 2. (a) c. 48.* are not all the cases wherein a view ought to be denied, but that they are put for example's sake, and that the true rule is that which is mentioned at the beginning of that chapter, that a view, being a dilatory, shall not be granted unless where a view is necessary. Wherever therefore it is plain that the tenant has sufficient knowledge what it is that the demandant sues for, there a view shall not be granted ; as for instance where a church is demanded, called by the name of a particular Saint and lying in such a vill, and the tenant says there are two churches in that vill and therefore demands a view, the demandant says by way of counterplea that there is but one church of that name in the vill ; this was holden a good counterplea, and the view was denied by the court, 36 H. 6. 16 ; in *Bro. Abr. tit. "View," pl. 70.*, and in *Fitz. Abr. tit. "View," pl. 22.* I could put many other instances of this sort, but I choose only to mention one which is exactly parallel to the present, and which is mentioned in what I have already read out of *Glanville*, that if the tenant be in possession of more lands in the vill than the demandant sues for, then he is entitled to a view because he cannot say what part of the lands are demanded : but if he be in possession of no other lands but those, then he shall not have a view. In order therefore to have made this counterplea

(a) Stat. 13 Ed. 1. c. 48.

good,

1742.

DAVIS
against
LEES.

good, the demandant should have said that the tenant was in possession of the lands demanded *and of no other in the same vill of Barlow*; which she has not done. The rule in 2 *Rol. Abr.* 730. Letter (I.) mentioned in the argument is certainly a right one, that where the jurors ought to have a view the party shall not have one: but it does not extend to the present case, for it extends only to such actions where a view is demandable of right, as in the case of an assize de novel disseisin, assize de nuisans, and an action of waste. But notwithstanding the late statute 4 & 5 *An. c.* 16. it is merely discretionary in the Court in a formedon whether the jurors shall have a view or not, according to the circumstances of the case, and therefore this is no reason to deny the party a view.

The judgment therefore of the Court is that, notwithstanding the counterplea of the demandant, the tenant must have a view."

T. 16 G. 2.
Wednesday,
July 7th.

DANIEL GINGER on the Demise of JOHN WHITE
against ELIZABETH WHITE.

Devise to A.
for life, then
to the chil-
dren of A.
successively
and their
heirs, and if
A. die with-
out issue then
to B. (son of
the elder
brother of
A.) in fee;
held that A.
only took an
estate for life.

THE following opinion of the Court was given by

Willes, Lord Chief Justice. "This comes before the Court (a) on a case reserved by my late Brother *Denton* at the assizes for the county of *Surry*, 24th of *March* 9 *Geo.* 2.

The case is thus; *John White*, the elder, grandfather of the lessor of the plaintiff, being seised in fee of the premises in question, and having two sons and one daughter, *Henry*, *John*, and *Sarah*, made his will on the 20th of *December* 1706 in these words; after a devise to his wife for her life of part of his house, he gives "the

(a) This case was argued at five several times; after the two first arguments which took place in *Easter* and *Michaelmas* terms 1737, the Court were about to give judgment in favor of the defendant: but on the day when the Chief Justice intended to have given that opinion, he began to entertain a doubt whether *John* the son took more than an estate for life; he accordingly deferred giving judgment then, and the case was afterwards argued in *Easter* term 1739, in *Michaelmas* term 1740, and in *Michaelmas* term 1741, and judgment was not given until *July* 1742.

same with the appurtenances and that part which he had given to his wife after her decease unto his son *John* for his life and to his daughter *Sarah* for her life in case she shall live unmarried in common between them, but in case the said *Sarah* shall marry or die before *John*, then in either of the said cases the said *John* shall have the sole use of the house for his life, and from and after the decease of the said *John* and *Sarah* or other determination of their estate therein he wills and devises the said house to the male children of the said *John* successively one after another as they are in priority of age and to their heirs; and in default of such male children he gives the same to the female children of the said *John* and their heirs; and in case the said *John* shall die without issue, then he wills and devises the house and premises to his grandson *John White* his heirs and assigns for ever."

1742.
GINGER
dem. WHITE
against
WHITE.

John White the son had no issue at the time of making the will, nor since. On the death of the testator *John* and *Sarah* entered and enjoyed the premises according to the will. *Sarah* is since dead, and *John* survived her, and on her death entered and enjoyed the whole premises in question according to the will; and after her death (and that of the testator's wife) by indentures of lease and release dated 9th and 10th of *January* 1718 he conveyed the premises in question to *John Steer* and his heirs to make him tenant to the freehold in order to suffer a common recovery, and declared the uses to himself and his heirs, and afterwards a recovery with double voucher was duly suffered; and afterwards *John* settled the premises on the defendant *Elizabeth* his wife and her heirs. *John* the son died about a year ago without issue. *Henry* the eldest son of the testator is still living; and his son *John* the grandson and devisee of *John White* the elder is the lessor of the plaintiff.

The question reserved is whether *John* the son took by the will an estate-tail, and so had a power to suffer a recovery and thereby to bar the remainder to *John* the grandson, or whether he was only tenant for life.

This is the general question: but it will depend upon two points,

1st, Whether he took an immediate estate tail by the devise to his male and female children;

4 U

2dly,

1742.

GINGER
dem. WHITE
against
WHITE.

2dly, If he did not, whether or no these words "In case the said *John* shall die without issue" did not give him an estate tail by implication in remainder after the limitation to his children; for in either case the recovery would bar *John* the lessor, because he claims by the subsequent devise "in case *John* his uncle died without issue."

As the question arises upon the construction of the will, I will consider in the first place (as I will always do in cases of this sort) what was the intent and meaning of the testator; because if the intent of the testator be plain and clear, though to be sure it cannot take place if it be inconsistent with the rules of law, I will always endeavour, if I possibly can, that the intent of the testator may take effect, and will never take pains to find out little niceties in the law to defeat the intent of the testator. For it is an excellent rule in the construction both of deeds and wills, that *verba intentioni, et non è contrà, debent inservire*. And now I am upon this general topic, before I enter upon the particulars of the present case, I beg leave to take notice of one mistake (for so I think it to be) which has occasioned more confusion in respect to the construction of wills than any one thing whatsoever.

What I mean is that a notion has prevailed that such particular words in a will are as much technical (*a*) words as others are in a deed, and as necessarily pass such an estate in a will as others

(*a*) In *Doe d. Comberbach v. Perryn*, 3 D. & E. 490, 1, Lord Kenyon Chief Justice said "There is no doubt but that formal words may be controlled by the context of the will: but we ought not to reject the legal meaning of those words, unless we are clear that in so doing we give effect to the deviser's intention" The giving effect to the intention of the deviser is the rule by which the courts proceed in construing wills; and they will put that construction on the will that will best answer the deviser's general intention, though by so doing they may defeat some particular intent inconsistent with it. *Roe d. Dodson v. Grew*, 2 Will. 323; *Denn d. Webb v. Puckey*, 5 D. & E. 303; *Doe d. Davy v. Burnfall*, 6 D. & E. 34; *Doe d. Candler v. Smith*; 7 D. & E. 531; *Roe d. Blandford v. Applin*, 4 D. & E. 82;

Doe d. Bean v. Halley, 8 D. & E. 5; and *Robinson v. Robinson*, 1 Burr. 38; in the last of which the devise was "to *L. Robinson* for life and no longer, and after his decease to such son as he should have, taking the name of *Robinson*, and for default of such issue" then over; and there in order to effectuate the general intent of the deviser it was holden that *L. Robinson* took an estate tail, notwithstanding the words "for life and no longer." And in *Doe v. Applin*, where the devise was "To *A.* for life and after his decease to and amongst his issue, and for default of issue" then over, it was ruled that *A.* took an estate tail, and that the words "and amongst" must be rejected, otherwise the deviser's general intent, which was to prefer the issue of *A.* to the more distant branches of his family, would be defeated.

do in a deed; as for instance that the word *issue* or *children*, where there are none at the time of the devise, do as necessarily create an estate tail in a will as *heirs of the body* do in a deed.

1742.
GINGER
dem. WHITE
against
WHITE.

But this I take to be a gross mistake; for why does the word *issue* in a will signify the same as *heirs of the body*? Only because it may be supposed that the testator, who was ignorant of the law, intended it should have that construction. It does not therefore *vi termini* create an estate tail in a will as "heirs of the body" do in a deed, but only where it appears to be the intent of the testator that the word should have that construction, or at least that it does not appear that the intent of the testator was otherwise.

In order therefore to find out what construction is to be put upon the words of a will, we ought in the first place to consider what the intent of the testator is, though this I am afraid is too often the last thing that is thought of. But the Court of King's Bench in the case of *Law v. Davies* (a) *M. 3 Geo. 2.* laid so much stress upon this, and upon the notion which I have now endeavoured to establish that they determined upon the first argument that even the words "heirs of the body" should not pass an estate tail in a will, because it plainly appeared to be the intent of the testator that they should not; for after the words "heirs of the body" he added these words "that is to say, his first, second, and every other son." Mr. J. *Reynolds* was pleased to say upon that occasion "Shall not a man be allowed to speak his mind in his will?" Surely a man ought to be allowed to do so; and yet if we consider how miserably some wills have been tortured, we may fairly say that this is a privilege that is not always allowed to testators.

Having premised this in general, I come now to consider the particular words of this will. And I think that the testator's meaning is as plain as possible, that *John* his second son should only have an estate for life, that the children of *John* should have an estate in tail general, and that in default of such issue the premises should go to *John* the son of his eldest son in fee.

(a) *Fitzg.* 113; 2 *Lord Raym.* 1561; 1 *Barnard*, 238; 2 *Str.* 849; and 2 *Equ. Caf. Abr.* 316. pl. 28. S.C.

Let

1742.

GROSS
dem. WHITE
against
WHITE.

Let us see therefore in the next place whether the words of the will, according to the rules of law, will admit of this construction. In the first place I will consider the devise to *the male and female children and their heirs*. That by the words "heirs" in both places must be meant "heirs of the body" cannot be denied, because in the first place *the male children* could not die without heirs if any of their sisters were living; and the *female children* of *John* the son could not die without heirs if *John* the grandson, the son of *Henry* the eldest son of the testator, were living. The testator therefore by the word "heirs" must necessarily intend "heirs of their bodies," according to the case of *Nottingham v. Jennings* (a) Tr. 12 W. B. R., which is founded on the case of *Webb v. Hearing*, Cro. Jac. 415, and the case of *Hearn and Allen*, Cro. Car. 57. It had been otherwise indeed if the remainder had been limited over to a stranger (b); because in that case there is nothing to shew that the testator intended by the first words *heirs of the body*; for in that case he might apprehend that a fee-simple might be limited after a fee-simple, which it cannot be by the rules of law, and therefore such limitation to a stranger has always been held to be void; as appears by two cases in the Year-Books 19 Hen. 8. 8. b. and 29 Hen. 8. in *Dyer* 33, and by many other ancient cases, besides a modern case of *Crumble v. Jones* (c), adjudged in B. R. Hil. 7 Anne.

In my arguing of the present case, I shall therefore all along take it for granted that the word "heirs" annexed to the devise to the children of *John* is to be construed "heirs of their bodies."

That the word "children" in a will will sometimes create an estate tail I do not deny; but what I insist on is that as this will is penned, according to the rule laid down in *Wild's* case 6 Co. 17. it does not create an estate tail here, and that all the cases in the books where the words "children" and "issue" have been adjudged to make an estate tail in a will are plainly distinguishable from the present case.

(a) Cited in *Preston d. Eagle v. Funnell*. Tr. 12 & 13 Geo. 2. sup. 166. See also *Preston v. Funnell*, and the cases there referred to; and *Goodright d. Goodridge*

v. Goodridge, Mich. 16 G. 2. C. B. post.

(b) See the cases referred to in n. a.

(c) Sup. 167. n. a.

The case of *Wild* is in point: If a devise be to *A.* and his children, if there be no children then in being, it gives an estate-tail, because the devise is in words de presenti; and there being no children in being, they must take by way of limitation. But if a devise be to *A.* and after his decease to his children, *A.* has only an estate for life, because then the words plainly shew that the children were intended to take by way of remainder (a). But in the present case it is not only said after his decease, but after the determination of the former estates, which plainly shews that the devise to the children was intended as a remainder in the present case. Besides, as I shall shew more particularly when I come to distinguish it from those cases where the word "children" has been construed to create an estate-tail, there are many more expressions in this devise which plainly shew that the word "children" ought to be construed as a word of purchase and not of limitation.

1742.
GINGER
dem. WHITE
against
WHITE.

The case of *King v. Melling*, reported in 1 *Ventr.* 225 (b) &c and the cases there cited to shew that the words "issue" and "children" have been sometimes construed so as to create an estate-tail, do not come up to the present case. The strongest case is that which he cites out of *Moor* 397. of a devise by *A.* to his son for life, and after his decease to the men children of his body, which was held to be an estate-tail. This indeed seems contrary to the judgment in *Wild's* case; but it is very different from the present case, and is distinguished by my Lord *Hale* from *Wild's* case because of the words "children of his body," which are proper words to create an estate-tail and shew that he had an eye to an estate-tail, which words are neither in *Wild's* case or in the present.

In the case of *King v. Melling* itself the devise was to *Barnard* for his natural life and after his decease to the issue of his body by a second wife; there were the words of his body, and besides the word "issue," which as Lord *Hale* himself says is a much stronger word than children: it is nomen collectivum, and takes in the whole generation (a) vi termini, and in common parlance it is

(a) Vid. *Doe d. Cooper v. Collis*, 4 D. & E. 294.

(b) 2 Lev. 59. S. C.

(c) See also *Doe d. Cooper v. Collis*, 2 D. & E. 299; and *Hay v. The Earl of Coventry*, 3 D. & E. 86.

1742.

GINGER
dem. WHITE
against
WHITE.

taken to mean heirs of the body (which is the best rule to judge of the construction of the words of a will); for it never can be imagined that a testator, who is always supposed to be inops concilii, did not intend that his words should be construed in their common sense, but that they should be construed in that sense that even lawyers themselves cannot agree upon nor find out the meaning of them till after a long investigation. Besides there are many words in the present devise, which are not in the case of *King v. Melling*, and plainly distinguish it from that case, as the words "successively, one after another as they are in priority of age," which shew plainly that the testator had an eye to a strict limitation. The words "heirs of such children," which I must construe "heirs of the body", afford still a much stronger argument. These words are not in either of the cases before mentioned; but they have always been construed to shew that the preceding words do not give an estate-tail. As in *Archer's case* 1 Co. 67. a. the devise was to *Robert Archer* for life and to his next heir male and to the heirs male of the body of such heir male; and held clearly that *Robert* took only an estate for life by reason of the addition of these words.

The case of *Clerk v. Day Cro. Eliz.* 313. is exactly to the same purpose; there the words are to *A.* his daughter for life and to the heir of her body and to the heirs of their body begotten; and held that *A.* had only an estate for life.

The only case that has the least resemblance to the contrary is the case of *Legatt v. Sewell* reported in 2 Vern. 551., and in several other books. There the words of the will were "To *William Legatt* for life, and after his decease to the heirs male of the body of *William Legatt* and the heirs male of the body of every such heir male severally and successively as they should be in priority of birth and seniority of age, and for want of such issue," the remainder over. The Lord Chancellor referred it to the Judges of B. C. (a), and three Judges against *Tracy J.* were of opinion that *William Legatt* took an estate-tail; but besides that Mr. J. *Tracy* was a very great Judge and his opinion of

(a) Vid. 1 P. Wms. 87.

great weight (a), that case is quite different from the present, because the words there are "heirs of the body," which vi termini even in a deed would create an estate-tail. And I have been informed that the Judges were all of opinion that if the first words had been "issue" or "children" *William Legatt* would only have had an estate for life; and that they went upon this rule, which I shall take notice of more particularly by and by, that where in the beginning of a will an express estate is given, it shall not be afterwards altered by implication, though it may be by express words: And if they did not go upon this distinction, I know not how to reconcile this case with the case of *Law v. Davies*. But upon this point it is plainly distinguishable, because in this case there are no express subsequent words, but there were in the case of *Law v. Davies*.

1742.
GINGER
dem. WHITE
against
WHITE.

For these reasons and upon the strength of these cases I am of opinion that *John* the second son took only an estate for life, notwithstanding the devise to his children.

Let us see in the next place whether the words "In case *John* die without issue" give him an estate-tail in remainder. I am as clearly of opinion that they do not, and I think there are several cases that warrant this opinion, founded upon a rule of law which has never been contradicted in any case, and that there is not one case to support the contrary opinion.

The rule of law that I mean is, that a precedent estate devised by express words cannot be lessened, increased, or altered, by implication (b), though it may by express words. And this is no new notion, but as it is founded on the best reason, it is agreed to be law by Lord *Hale* in the case of *King v. Melling*; and he cites a case for that purpose as old as the 1st and 2d *Eliz.*, from

(a) According to the report of this case in 1 *P. Wms.* 92. "The Court appearing not satisfied with the certificate of the three Judges directed that an ejectment should be brought in *B. R.*, in order to have the matter settled; but it is said the parties agreed, and so the question was not determined." But in *Garth v. Baldwin*, 2 *Vez.* 637. Lord Chancellor *Hardwicke*,

speaking of this case and of the opinion of the three Judges, added "Indeed *Tracy J.* held otherwise; upon that Lord *Cowper* seemed to doubt (as I have heard,) but held himself bound to agree with the three Judges, and so decreed."

(b) *Doe d. Bean v. Halley, & Durnf. & East* 5.

1742.
GINGER
dem. WHITE
against
WHITE.

Dyer 171. Upon this rule the case of *Popham v. Bamfield*, reported in 1 *Salk.* 236, 2 *Vern.* 427, 449, and 1 *P. Wms.* 54. (but best (a) I think in *P. Williams*,) was determined in as solemn a manner as possible by Lord Keeper Wright, assisted by three very great Judges, *Holt*, *Trevor*, and *Powell*, and *Trevor* then Master of the Rolls. The case as stated in 2 *Vernon* was thus; a devise to *A.* for life, and then to his first and every other son in tail male, and if *A.* die without an heir male of his body begotten, remainder over to another; in *Salk.* it is "without issue male of his body;" in *P. Wms.* "and for want of issue male of *A.*" The devisor afterwards made a codicil, wherein he recited that he had given *A.* an estate-tail, as it is reported in *Salkeld*; but, as it is reported in *P. Wms.*, that he had given his estate to *A.* and the heirs male of his body; held by the Lord Keeper, the Master of the Rolls, and all the Judges, that *A.* took only an estate for life; and they founded their opinion on this rule, that where an express estate for life is given, it shall not be enlarged to an estate-tail by implication: but they all agreed that if the devise had been to *A.* generally, and if he die without issue of his body than to *B.*, without any intermediate devise between the devise to *A.* and the words "and if he die &c," there *A.* should have had an estate tail. They agreed likewise that, if there were a devise to *A.* for life, and then to the issue or heirs of his body, this devise being by express words would give *A.* an estate-tail, notwithstanding the express devise to him for life before. They held likewise that the recital in the codicil did not make any alteration, for that in common parlance even a strict settlement is called entailing an estate.

It has been said that this has been held not to be law. I am sure I have heard it cited above twenty times in the Court of Chancery, and never yet heard it contradicted, and I believe never shall again, except by those persons who know not how to distinguish it (though the distinction is plain and obvious) from some other subsequent cases. But *P. Williams*, in his argument in the case of *The Attorney General v. Sutton &c* in the

(a) In the argument of the case of the *Attorney General v. Sutton*, 1 *P. Wms.* 760, Mr. *P. Williams* said that that of *Bamfield v. Popham* was wrongly reported in *Salkeld*.

House of Lords, 1 *P. Wms.* 754, though it seemed to be a case that made against him, admitted it to be undoubted law, but plainly distinguished it from that case, as I shall shew presently when I come to take notice of it.

1742.

GINGER
dem. WHITE
against
WHITE.

In the case of *Lodington v. Kime*, *Salk.* 224, and 3 *Lev.* 431, where there are exactly the same words as in the present case, it is "and if he die without issue male," the Judges, though they differed in other matters, were all unanimous that the first taker took only an estate for life, because the first devise was to him expressly for life: and when it came afterwards before the House of Lords, they were likewise of the same opinion as to this point, and so were all the Judges who attended there and gave their opinions.

The only cases that seem to thwart this are the case of *King v. Melling*; a case there cited, to *A.* and if he die without issue &c; and another, to *A.* for life, and if he die without issue &c; the aforementioned case of *The Attorney General v. Sutton*; the case of *Langley v. Baldwin*, which is cited and fully stated in the argument of that case 1 *P. Wms.* 759; and the case of *Shaw v. Way*, sometimes called by the name of *Spencer v. Shaw*, first determined on the *Chester* circuit, then in the King's Bench, and then in the House of Lords.

The case of *King v. Melling* and the two cases there cited are distinguishable from the present. In the first the devise was to *A.* for his natural life and after his decease to the issue of his body by his second wife; so there, though the first devise was to *A.* for life expressly, the following words were express likewise "to the issue of his body," which word "issue" in that place was construed to signify the same as "heirs of his body;" so the rule concerning implication was not broken through, but admitted by Lord *Hale*, as I said before. The case where the devise was to *A.* generally is likewise clearly out of the rule. The other case, where the devise was to *A.* expressly for life, and if he die without issue &c, likewise differs widely from the present case, because there is no intermediate devise to the children, and therefore the word "issue" must be rejected, if it be not construed to give *A.* an estate-tail. And

1742.

GINGER
dem. WHITE
against
WHITE.

this makes a great difference, as will appear when I come to take notice of the cases of *Langley v. Baldwin* and *The Attorney General v. Sutton*: but in the present case the word "issue" need not be rejected, but may have a reasonable construction, viz. to mean such issue as he had mentioned before; and it could mean no other, for he had devised the estate before to all his sons and daughters.

In the case of *Langley v. Baldwin* the devise was to *A.* for life, without impeachment of waste, and with power to make a jointure, remainder to the first son in tail male, and so on to the sixth and no farther; and then followed these words "and if *A.* should die without issue male of his body" then to *B.* in fee. This case in May 1707 was referred by Lord Chancellor *Cowper* to the Judges of the Common Pleas; and they were all of opinion that there being no limitation beyond the sixth son, and for that there might be a seventh who was not intended to be excluded, therefore to let in the seventh and subsequent sons to take, but still to take as issue and heirs of the body of *A.* by descent and not purchase, they held that the words "if he die without issue male of his body" gave *A.* an estate-tail. But the words there are very different from the words in the present case, the devise there going no farther than the sixth son. Besides I own that I do not like that determination; and I think I could put such a construction on the words as would better answer the intent of the testator, for his intent was as plain as possible that *A.* should only have an estate for life. If the case of *Popham v. Bamfield* indeed were rightly reported in *Salkeld*, who carries the limitation no farther than the tenth son, it would be exactly the same as the case of *Langley v. Baldwin*: but *P. Williams* admits that the limitation there is to the first and every other son, which distinguishes it from the case of *Langley v. Baldwin*, because there is no occasion to put the same construction on the words "if he die without issue" in order to aid the intent of the testator. And the same reason distinguishes it from the present case, where the devise is to all the children of John.

There is the same distinction likewise in the case of *The Attorney General v. Sutton*; for there the limitation went no farther than to the second son of *Thomas Sutton*, and yet the House of Lords

Lords there determined that *T. S.* took only an estate for life. I own that the Court of Exchequer held the contrary, but their decree was reversed by the House of Lords. There the words of the devise were to *T. Sutton* for life, and afterwards to his first son or issue male of his body lawfully to be begotten, and to the heirs male of the body of such first son, remainder to his second son and his issue male in tail, (as before) going no further than the second son; and then follow these words "that immediately after the death of *T. Sutton* without issue male of his body, the premises should go to trustees for charities (a)."

1742.
GINGER
dem. WHITE
against
WHITE.

As to the case of *Shaw v. Weigh* (b), if the words were the same as in the present case, it is a case of no great authority; for though Mr. J. Cowper and *Winnington* were of opinion that it was an estate-tail, the Court of King's Bench were unanimously of opinion that the sisters there took only estates for life; and though the House of Lords reversed that decree, it was against the opinion of nine Judges against three. Besides the case there was as different from the present as possible, because there the limitation over was to "the issue or issues of *her or their bodies* lawfully begotten." The words of that devise were "I give all my estate consisting in houses &c to trustees (in the will named) upon trust for my loving sisters *Ann* and *Dorothy* equally betwixt them during their natural lives without committing any manner of waste; and if either of my said sisters happen to die *leaving issue or issues of her or their bodies* lawfully begotten or to be begotten, then in trust for such issue or issues of the mother's share, or else in trust for the survivors or survivor of them and their respective issue or issues; and if it shall happen that both my said sisters shall *die without issue as aforesaid*, and their issue or issues to die without issue or issues lawfully to be begotten, then the said trustees to stand and be entrusted to and for my kinsman Mr. *John Swift* and the heirs male of his body lawfully begotten, and for want of such issue then in trust for my godson *R. G.* and the heirs male of his body lawfully to be begotten; and for want of such issue then in trust for the heirs male of *W. R.* lawfully begotten or to be begotten; and for want of such issue then in trust for my godson *R. Gifford* and

(a) See Cox's ed. of *P. Wms.* 1 vol. page 756. note. *Cas. Abr.* 184. pl. 28; 2 *Str.* 793; and *Fort.* 58.

(b) *Fitzg.* 7; 8 *Mod.* 253, 382; 1 *Eq.*

his

1742.

GINGER
dem. WHITE
against
WHITE.

his heirs for ever lawfully begotten or to be begotten &c.” There the limitation, which was to give the estate-tail was in express words, and so does not come within the rule laid down in the case of *Popham v. Bamfield*, which I rely upon in the present case. But for the reasons already mentioned we (a) are of opinion that by the words of this devise *John* the second son took only an estate for life, and that he did not take an estate tail either immediately or in reversion.

“So the lessor of the plaintiff must have the *postea* (b).”

(a) It does not distinctly appear whether or not Mr. J. *Fortescue A.*, who was not present when this judgment was given,

agreed with the rest of the Court.

(b) Vid. *Goodtitle d. Cross v. Woodhull*, Mich. 1745. C. B. *post*.

T. 16 G. 2.
Wednesday,
July 7th.

BROADBENT *against* WILKS.

A custom that “where the customary tenant of a manor has coal mines lying under the freehold lands of other customary tenants, within and parcel of the manor, he may sink pits in those lands to get the coals &c, may lay the coals when got and the earth and rubbish &c on the land near to such pits, such lands being customary tenements and parcel of the manor, there to remain and continue (not saying how long, or for a convenient time,) may lay and continue wood there for the necessary use of the pits, may take away in carts and waggons part (not saying how much) of the coals, and burn and make into cinders the other parts there at his will and pleasure,” is a bad custom, as being uncertain and unreasonable.

Judgment entered up for the plaintiff in trespass, notwithstanding a verdict for the defendant on a plea of justification, the plea being bad in law.

on the land *near to such pits*, such land being customary tenement and parcel of the manor aforesaid, *there to remain and continue*, and to cast lay place and continue wood there for the necessary use of the said pits, and to take and carry away from thence with carts waggons and other carriages part of the said coals so laid and placed there, and to burn and make into cinders there other part of the said coals so laid and placed there at his and their will and pleasure; and so goes on to justify under the custom.

1742.
BROADBENT
against
WILKS.

There was a verdict for the defendant at the last *Yorkshire* assizes.

It was moved in the last term by *Prime King's Serjt.*, *Belfield Serjt.*, and *Agar Serjt.*, to arrest the judgment; a rule nisi was made, and afterwards, *May 24th*, *Willes King's Serjt.* and *Bootle Serjt.* shewed cause against the rule. It appearing to be a case of some difficulty, we took time to consider of it until this term.

And now I delivered the judgment of the Court (absent Mr. *J. Fortescue A.*) as follows.

This is in arrest of judgment; and the objection was that the custom insisted on by the defendant was in point of law no good custom,

1st, Because it is uncertain; and

2dly, Because it is an unreasonable one;

And we are all of opinion with the plaintiff upon both points.

First; That every custom must be certain is laid down as a rule in all the books, which treat of customs. It is said of a custom, as by way of definition, that *consuetudo ex certâ et rationabili causâ privat communem legem.* *Davis's Rep.* 32. And it must be certain for two plain reasons; 1st, Because if it be not certain, it cannot be proved to have been time out of mind; for how can any thing be said to have been time out of mind when it is not certain what it is? 2dly, It must be certain because every custom presupposes a grant; and if a grant be not certain, it is void. This is a rule so well established that I shall cite but very few authorities to support it. It was so holden

1742.
BROADBENT
against
WILKS.

in *Davis's Rep.* 33. 35.; 1 *Rol. Abr.* 565. a. 2 *Rol. Abr.* 264. (D), pl. 1. and 265. (D), pl. 2. (a).

If every uncertain custom be void, this cannot be good, for nothing can be more uncertain. The word "near (b)" is not intelligible: but, to make it certain and intelligible, it should be "nearest" or "adjoining." Supposing many lands and of different persons lay within a small distance, some ten yards off, and some twenty &c; which of these lands must be said to be *near* within the meaning of this custom? The custom, that is laid, is to take and carry away part of the coals placed there, and to burn and make into cinders the other parts thereof, not saying what part, nor how long it is to lie there. So in this respect the custom is likewise quite uncertain.

Secondly; All customs must be reasonable (c), otherwise they are void, as is expressly held in *Davis's Rep.* 32. a. 33. b. 35. a.; 1 *Leon.* 11; 2 *Rol. Abr.* 266; *Co. Lit.* 59. b. 62. a. 140. a.; and in 59. a. an instance is put of such an unreasonable and void custom.

(a) A custom for *poor and indigent householders* living in *A.* to cut and carry away rotten boughs and branches in a chace in *A.* is bad, the description of *poor householders* being too uncertain. *Selby v. Robinson*, 2 *D. & E.* 758. But a prescription to take three *Winchester* bushels of barley out of and for every ship's cargo of barley brought upon a quay to be exported in any ship is sufficiently certain; for the word "cargo" is a mercantile term, and intelligible when referred to a ship. 2 *Str.* 1228; 1 *Wils.* 91. See the observation of the learned editor (oct. ed.) of *Sir J. Strange's Reports* on the accuracy of the printed report of that case.

(b) But in *Bennington v. Taylor*, 2 *Lutw.* 1517, A prescription for so much money for setting up a stall in a fair, and for ground *near* the stall, and occupied with it, was holden to be sufficiently certain, because it may be ascertained by the usage of the fair.

(c) A custom, "that when a tenant took a farm in which there was any open

field, more or less, for an uncertain term, it was considered as a holding from three years to three years," was holden to be unreasonable and void, because one rood might determine the tenure of 100 acres inclosed. *Roe d. Bree v. Lees*, 2 *Bl. Rep.* 1171.—So a custom in a parish "that every parishioner may bury his dead relations in the church-yard as near as possible to their ancestors" was ruled to be unreasonable and bad. *Fryer v. Johnson*, 2 *Wils.* 28.—But it is a reasonable and good custom that tenants whether by parol or deed shall have the away-going crop after the expiration of their term, it being for the benefit and encouragement of agriculture. *Wigglesworth v. Dallison*, *Dougl.* 201. So also a custom, that the tenant may leave his away-going crop in the barns &c of the farm for a certain time after the expiration of his lease and his quitting the estate, is good. *Beavan v. Delahay*, 1 *H. Bl. Rep.* 5. See the case of *Bell v. Wardell*, *sup.* 202, and the cases there referred to.

And

And certainly no custom can be more unreasonable than the present. It may deprive the tenant of the whole profits of the land; for the lord or his tenants may dig coal-pits when and as often as they please, and may in such case lay their coals &c on any part of the tenant's land, if near to such coal-pits, at what time of the year they please, and may let them lie there as long as they please; for the custom, as it is laid, does not say *at convenient times*, nor *till they can be conveniently removed*; nor does it say that they may be laid there for the *necessary* use or enjoyment of the pits. So they may be laid on the tenant's land and continue there for ever, though it may be more convenient for the lord to bring them on his own land, which is absurd and unreasonable.

1742.
BROADBENT
against
WILKS.

The objection that this custom is only beneficial to the lord (a), and greatly prejudicial to the tenants, is, we think, of no weight; for it might have a reasonable commencement notwithstanding, for the lord might take less for the land on the account of this disadvantage to his tenant. But the true objections to this custom are, that it is uncertain and likewise unreasonable, as it may deprive the tenant of the whole benefit of the land, and it cannot be presumed that the tenant at first would come into such an agreement.

The cases that were cited for the defendant were 1 *Leon.* 266; 8 *Co.* 126; 2 *Bulstr.* 195; 3 *Lev.* 160. But none of these cases are at all like the present, except the case in 1 *Leonard*, which comes the nearest to it. But that is different from it in this respect, that the custom there was *certain*; and though it was not a very reasonable one, it was not so unreasonable but that it might have had a reasonable commencement.

As to what was said that this defect was aided by the verdict, for that the jury, having found for the defendant, have found that there was such a custom, we think that this will not be so; for if the custom be in point of law a void custom, the finding

(a) See *Bateson v. Green*, 5 *D. & E.* 411; *Clarkson v. Woodhouse*, *M.* 23 *G.* 3. *B. R.* *ib.* 412; *n. a.*; and *Folkard v. Hemmett*, Sittings after *E.* 16 *Geo.* 3. *C. B.* *ib.* 417. *n. a.*

1742.
BROADBENT
against
WILKS.

of the jury will not help it, as has been determined in several cases.

We are therefore of opinion that judgment must be arrested, and the rule for that purpose made absolute."

The counsel for the plaintiff, having mistaken the form of their rule, afterwards obtained another rule calling on the defendant to shew cause why judgment should not be entered for the plaintiff, notwithstanding the verdict for the defendant; on the authority of *Salk.* 173. *Jones v. Bodenham*; *Carth.* 319. *Philips v. Bury*; *Staple v. Heydon*, 6 *Mod.* 1; 2 *Rol. Abr.* 98, 99 *Vin. Abr.* title "Judgment," and *Craven v. Hanley (a)*, *C. B.*; which rule was opposed in the following term.

"Saturday, Nov. 13th, *Willes Serjt.* and *Bootle Serj.* shewed cause for the defendant why judgment should not be entered for the plaintiff.

They admitted the cases cited by the plaintiff's counsel, but endeavoured to distinguish this case from them, because they said that in them there was but one count and one issue, whereas in the present case there were two counts, and the defendant had pleaded not guilty to all the trespasses in the second count and to the force and arms in the first count, and that that issue was found for him. They insisted therefore that as the whole verdict could not be set aside, there could not be judgment for the plaintiff, but that there must be a venire facias de novo; and for this purpose they cited 1 *Rol. Abr.* 801, 802; 2 *Rol. Abr.* 722. *pl.* 19, 20., and some other cases.

But the cases cited only prove that where several issues were joined and the jury did not find a verdict upon all of them, or where they found a special verdict on one of them which afterwards proved to be defective, or where in the case of a demurrer to part and an issue joined as to the rest and a venire awarded to inquire of damages on the demurrer as well as to try the issue the jury did not inquire of the damages on the demurrer,

(a) *Barnes* 255. *Com. Rep.* 548.

in all these cases there must be a venire facias de novo; and that in the last case it could not be helped by a writ of inquiry, for the jury must pursue their authority and try every thing that they are directed to try, otherwise their verdict is defective and there is no other remedy but a venire facias de novo (a). But the present case is very different; for here the jury have found a verdict on both issues, and there is no default in them; and therefore there is no difference between this case and the cases cited for the plaintiff, only the judgment must be entered in a different manner, that is, judgment for the defendant on the issue that is found for him, and an interlocutory judgment for the plaintiff as to the other.

1742.
BROADBENT
against
WILKS.

This gave us an occasion to inquire how the judgments are entered in these cases, and how the judgment ought to be entered in the present case; we therefore enlarged the rule, that precedents might be laid before us, and that the postea might be brought into court before we directed how the judgment should be entered.

It was said by the officers that in the case of *Craven v. Henley* the judgment was entered up without taking any notice of the verdict, as upon the defendant's confessing the trespass, which we thought very wrong, and therefore ordered that matter to be inquired into, that if it were so and the judgment not actually entered on record we might rectify it, which otherwise we could not do after the term in which the judgment was pronounced.

Two precedents were cited of the entries of these sorts of judgments; 2 *Rol. Abr.* 99 (b); and *Cartbew* 372. (c), the case of *Jones v. Bodinner*, the last of which seems to be exactly copied from the other; and in both of them the issue and verdict are entered; and then the record goes on and says that because it appears to the Court that the matter pleaded by the defendant by way of justification is not a good defence, and as he hath

(a) See the cases on this head collected in 1 *D. & E.* 528. n. b, and in 2 *D. & E.* 126. n. a.

(b) 2 *Rol. Abr.* 99. D. p. 1.

(c) *Comb.* 379; *Salk.* 173; 1 Lord *Raym.* 90; and *Com.* 8. S. C. See also *Broome v. Rice*, 2 *Str.* 873.

1742.
BROADBENT
against
WILKS.

confessed the matters alleged in the declaration, therefore it is adjudged that the replication issue and verdict shall be all set aside and annulled, and then an interlocutory judgment is given as upon the confession of the defendant, and an inquiry of damages is awarded.

At first I thought this a very good method of entering up judgment in this case, but upon consideration I thought it would be better to enter it up in this manner, after setting forth the replication issue and verdict, and the opinion of the Court on the plea, that *notwithstanding such verdict* judgment should be for the plaintiff, because by this mode of entry some difficulties would be avoided which might arise in the present case where the verdict was not to be set aside in toto.

And my Brother *Burnett* said there were several entries in *Townsend's Judgments*, title "Prohibition (a)," in this manner.

In order therefore that we might settle a right entry in the present case, we enlarged the rule till *Monday* the 22d of *November*."

The following note occurs on a subsequent day in the same term.

"It appeared that no judgment had ever been entered up in the case of *Craven v. Henley*, one or both of the parties being dead. And in the present case we ordered the pleadings verdict and issue to be entered up, and then to enter up judgment (b) on the first issue for the plaintiff, notwithstanding the verdict (c) by reason that the defendant had by his plea confessed the trespass, and had not insisted on any legal justification. But we left it to the plaintiff to enter up judgment for the defendant on the second issue either now or after the writ of inquiry executed, as he should be advised."

(a) Vid. *Townsf. Judgm.* 170, 174.

(b) The judgment in this case was affirmed in *B. R.* on error, 2 *Str.* 1224; and 1 *Wils.* 63. S. C.

(c) *Barnes* 266. S. C.—See also *Kirk v. Nowill*, 1 *D. & E.* 123 &c; where the same rule was made. But in *Selby v. Robinson*, 2 *D. & E.* 759. where the defendant, in an action of trespass, had justifi-

fied under a custom which was bad in point of law, a different course was pursued; the verdict found for the defendant, establishing the custom, was set aside, and judgment entered for the plaintiff on that issue.—But in these cases the plaintiff is not allowed any costs upon the issue found for the defendant. *Kirk v. Nowill*, 1 *D. & E.* 266.

1742.

FISHER *against* KITCHINGMAN.

"A RULE nisi (a) had been made for a new trial in a special action on the case, which had been tried at the last *York* assizes before my *Brother Burnett*.

The objection was that he had allowed a *postea* to be given in evidence for the plaintiff, which he ought not to have done. The case, as he stated it, was thus. It was a special action on the case for the fifth part of the expence of a suit, to which the defendant had agreed to contribute in that proportion. The defendant pleaded the general issue, non assumpsit. The agreement was laid and proved, which recited that an action was brought and a declaration delivered; and then the declaration goes on and says (inter alia) that such proceedings were had in the cause that it came on to be tried on an issue joined before Mr. *J. Parker* on such a day at the assizes for *Yorkshire*, held on such a day; and that a juror was withdrawn, and the cause referred by rule of court, and an award made. It was admitted that the only evidence that was produced of the cause being brought to a trial on an issue joined, and of a juror's being withdrawn, and a rule of reference entered into, was the record of nisi prius and the *postea* indorsed upon it.

And the single question is whether the record of nisi prius with the *postea* indorsed was proper evidence of these facts. The record of nisi prius and *postea* were produced by the associate of that circuit, who swore that they had been in his custody ever since the trial.

Several cases were cited on both sides to shew that *postea*s were and were not evidence. But

We were of opinion that no general rule could be laid down in relation to this point; but that they were or were not evidence according to the nature of the thing which they were produced to prove. If they were produced only to prove that

(a) On the application of *Agar Serjt.* and *Draper Serjt.*

M. 16 Geo. 2.
Thursday,
Nov. 11th.
The nisi prius
record and
the *postea* in-
dorsed are
evidence to
prove that
the cause was
tried, but not
to prove that
a verdict was
given.
Barnes 449,
7 Mod. 451,
oct. ed. S. C.

1742.
FISHER
against
KITCHING-
MAN.

a cause was brought on to a trial, as in the present case, or that such a cause was actually tried, we were of opinion that the record of nisi prius and postea were good and proper evidence (a). But if it were necessary that a verdict should be given in evidence, we were of opinion that they were not sufficient evidence; but that the postea ought to be returned and the verdict entered on record and judgment entered upon it (b): and then a copy of the record would be proper evidence. For otherwise it would not appear but that the verdict might be set aside, or judgment arrested. The only doubt that stuck with me was whether the associate was the proper person to produce the postea in evidence; because by several rules of court it ought to be returned into court to the proper officer within the four first days of next term. But the prothonotaries informing us that scarcely one postea in an hundred is so returned, and hardly ever when a juror is withdrawn, I thought that this objection was not of sufficient weight to set aside the verdict. And therefore

My Brother *Parker* and I were both of opinion that my Brother *Burnett* did right in admitting this evidence, and we discharged the rule for setting aside the verdict (c)."

(a) The same point had been before ruled by Lord Chief Justice *Pratt* at the *Surry* assizes, 5 Geo. 1. in *Pitton v. Walter*; 1 Str. 161; and by Lord Chief Justice *Raymond* at the *London* Sitt. M. 24 Geo. 2. R. v. *Iles*, Bull. N. P. 243; and afterwards in *R. v. Minns*, Sittings at *Westminster* after Tr. 20 Geo. 2. ib.

(b) But this rule does not hold in the case of a verdict on an issue directed out

of Chancery, because it is not usual to enter up judgment in such a case: the decree of the Court of Chancery is proof that the verdict is in force. *Montgomerie v. Clarke*; at the Delegates, 1745, Bull. N. P. 234.

(c) Afterwards a motion was made to arrest the judgment in this cause; and according to *Barnes* 284. judgment was arrested in *East*, 16 Geo. 2.

1742.

GOODRIGHT on the demise of JOHN GOODRIDGE
against ELIZABETH GOODRIDGE.

M. 16 Geo. 2.
Wednesday,
Nov. 17th.

THE opinion of the Court was delivered, as follows, by

Willes, Lord Chief Justice. "This comes on before the Court on a case (a) that was made before my Brother *Abney* at *Exeter* at the assizes held for the county of *Devon* 20th of *July* 1741.

The case is in short this. *John Goodridge* being seised in fee of the premises in question, and having two sons *Richard* and *John*, made his will 9th of *August* 1733; and having given all his lands to his wife *Joan* for her life, except one field which he devised to her in fee, and after having given several pecuniary legacies to his children, used these words on which the question depends; "and my will is that if my son *Richard* do happen to die without heirs, then my son *John* shall enjoy my lands." The devisor is dead. *Joan* is also dead. After her death *Richard* enjoyed the lands, and died without issue on the 14th of *February* 1740, and without having levied any fine or suffered any recovery, and devised the premises by his will to his wife the defendant *Elizabeth* and her heirs. *John* the second son is the lessor of the plaintiff. Many other things and other parts of the will were stated in the case: but they are altogether immaterial to the point in question, which is simply this,

The devisor, having devised his lands to his wife for life, added these words in his will, "if my son R. (the eldest) happen to die without heirs, then my son J. shall enjoy my lands:" held that R. took only an estate-tail, and that on his death without issue, and without having levied a fine or suffered a recovery, J. was entitled to recover from the devisee of R.

7 Mod. 453.
oct. ed. S. C.

Whether *Richard* the eldest son, considering the words of his father's will, were tenant in tail or tenant in fee: if he were only tenant in tail, his brother, the lessor of the plaintiff, is undoubtedly entitled to recover; if he were seised in fee, the right is as plainly in the defendant, his devisee.

This question will depend upon these two points,

1st, What construction is to be put upon the word "heirs" in the will;

(a) Which was argued on *Tuesday* November the 9th 1742 by *Skinner* King's Serjeant for the plaintiff and *Beffield* Serjeant for the defendant.

1742.

GOODRIGHT
dem. GOOD-
RIDGE
against
GOODRIDGE.

2dly, If it is to be taken to signify *the heirs of the body of Richard*, then whether or no it will turn his estate in fee into an estate-tail, considering that no express estate is devised to him before.

If the first question be against the plaintiff, the second will never arise; for if the words "*heirs of Richard*" be taken in their general signification, he had certainly an estate in fee; and then the remainder over limited generally to *John* is undoubtedly void, for an estate cannot be limited over after an absolute fee either by way of remainder or by way of executory devise.

But the words "*heirs of Richard*" in the present will must be taken to mean *heirs of his body*; for *Richard* could not die without heirs, if his brother *John* were living. And this rule of construction, which is founded on good reason, has been settled in a multitude of cases (a), and seemed not to be much controverted by the counsel for the defendant in the present case. There is no case that I know of, in which it was ever doubted, except the case of *Hearn v. Allen*, Cro. Car. 57, and there were two very great Judges, *Yelverton* and *Croke*, against the other three. But ever since that time the cases have been all uniform and agreeable to the reason of the thing. It is so expressly determined in the case of *Webb v. Hearing*, Cro. Jac. 415; in the case of *Chadock v. Cowley*, Cro. Jac. 695; in the case of *Parker v. Thacker*, 3 Lev. 70; in the case of *Blaxton v. Stone*, 3 Mod. 123; and in the case of *Nottingham v. Jennings* (b), Tr. 12 W. 3. B. R., in which all the former cases were considered and agreed to be law. It would have been otherwise indeed if the second limitation had been to a stranger, because then the testator's intent had not been apparent, but he might intend to limit a fee after a fee, which cannot be by the rules of law. And this distinction is settled in the case of *Crumble v. Jones* (c), Hil. 7 An. B. R., according to the case in *Dyer* 33, and several old cases in the Year Books.

Secondly; I shall therefore, in considering the second point,

(a) See *Preston d. Eagle v. Funnell*, sup. 164. and the cases there referred to; and *Ginger d. White v. White*, sup. 348.

(b) Cited in *Preston d. Eagle v. Funnell*, sup. 166. note (d).

(c) Sup. 167. note (a).

take it for granted that the word "heirs" means "heirs of the body of *Richard*," and then the clause will run thus; "if my son *Richard* do happen to die without heirs of his body, my son *John* shall enjoy my lands"; which is the same thing as if he had said "I give my lands to my son *John* if my son *Richard* die without heirs of his body", in which case there could have been no doubt but that *Richard* had been only tenant in tail.

1742.
GOODRIGHT
dem. GOOD-
RIDGE
against
GOODRIDGE.

But a distinction was endeavoured to be made by the counsel for the defendant, where there is an express devise to the eldest son and his heirs in the former part of the will, and where there is no such devise, for in that case it was said that the eldest son took a fee-simple by descent which could not be altered or restrained by implication, and that as he claims nothing by the will he ought not be affected by any part of it.

But this distinction has no foundation either in reason or law. In reason it has none; for as every tenant in fee-simple has power to dispose of his estate as he pleases, and the heir has no right but what is controllable by his ancestor, so the only question is what the testator intended; and it is absurd to say that it is more plain that he intended that his heirs should have a fee-simple when he has given him no such estate by his will than when he has expressly devised it to him and his heirs. Besides it is admitted that when a man devises his estate to his heir in fee such devise is void, and he will take by descent and not under the will, as has been determined in a multitude of cases. And it is strange to say that a devise in a will which is absolutely void shall make any alteration in the construction.

Nor has the distinction any foundation in law; nor do the cases, that were cited to support it, prove any such thing. *Altam's* case, which was cited out of 8 Co. 148., has no relation to it; only it happens to be said in general in that case that fortior est dispositio legis quam hominis, a maxim which is very true in many instances, but it is in nowise applicable to the present case.

In *Clacbe's* case reported in *Dyer* 330. b. it is only determined that an heir at law shall not be disinherited by a possible implication;

1742.
 GOODRIGHT
 dem. GOOD-
 RIDGE
 against
 GOODRIDGE.

cation; for in that case the most probable implication was in favour of the heir. But in the present case there is not only a possible or a probable implication, but it manifestly appears to be the intent of the testator that his heir should only have an estate-tail; so very manifestly that I think it might be called a necessary implication, which even *Vaughan* in the case of *Gardener v. Sheldou, Vaug.* 259. (which was cited as an authority for the defendant) admits is sufficient to disinherit an heir; and he goes farther (a) in favour of an heir than ever any person did before; and this case, as I shall shew presently, is so far from being an authority for the defendant that it is an express authority against him.

The case of *Hamsworth v. Pretty, Moor* 644, is not a very intelligible case, and it is no authority in favour of the defendant, or in favour of this distinction; for there was an express devise to the eldest son and his heirs, and it was there holden that a devise to the three younger children was a good devise, if the heir did not perform a condition; though it was holden that the heir took by descent, and that the condition did not affect his estate; so that I do not understand what the Court in that case founded their opinion upon, and I rather imagine that the case is not rightly reported (b).

The case of *Soule v. Gerrard or Garret*, reported in *Cro. El.* 525, and *Moor* 422, depends merely on the construction of the word "or", and is in nowise applicable to the present case. Besides in that case there was an express devise to the eldest son and his heirs.

The case of *Scrape v. Rhodes* (c) in this court in 1736 has no resemblance to this or any other case.

But though there are no cases in favour of this distinction, there are several which shew that it has never been regarded,

(a) *Moore d. Fagge v. Heafeman, sup.* 140, 141.

(b) According to the report of this case in *Cro. Eliz.* 919, "the devise to the eldest son and his heirs is void by way of devise: but it is an immediate devise or limitation to the younger children if the eldest son performs not the condition, which may well be; as a devise that his executors shall sell his land if his heir pay

not unto them such a sum, in the interim the freehold shall descend to his heir." And in p. 833, "*Gawdy J. and Fenner J.* held that if it were a good devise to the eldest son, yet this condition is a limitation of his estate, and shall give it to the second son (younger sons) and daughter upon the default of payment."

(c) *Com. Rep.* 542.

of which I shall only mention two or three, which I think will be sufficient in so plain a case as the present. That the heir's estate may be turned into an estate-tail by implication, though there is no express devise before to the heir, appears plainly from *Cofen's* case in *Owen* 29, which though very imperfectly stated is clear enough as to this point. In that will there was no devise to the eldest son *Richard*, but there are these words "If it please God to take to his mercy my son *Richard* before he hath issue, so that my lands shall descend to my son *George* before he shall be of the age of twenty-one, then my overseers shall have my land until *George* comes of that age:" held by all the Justices that *Richard* had only an estate-tail; which is a much stronger case than the present, for in that case there is only an implication that *George* the second son should have the estate in case *Richard* the eldest died without issue of his body: but here it is said so in express words.

1742.
GOODRIGHT
dem. GOOD-
RIDGE
against
GOODRIDGE.

The case of *Gardner v. Sheldou* in *Vaughan* is likewise as to this purpose a case in point; for there was no express devise to *George* the eldest son and heir, but the question depended on these words "If it happen that my son *George* and *Mary* and *Katherine* my daughters die without issue of their bodies lawfully begotten, then all my free lands which I am now seised of shall come remain and be to my nephew *William Rose* and his heirs." There was a great doubt what estate *George* took by these words, and whether or no the daughters took any estate at all; but there was no doubt but that if *George* *Mary* and *Katherine* all died without issue of their bodies *William Rose* would be entitled to the estate either as a contingent remainder or by way of an executory devise.

In a case in 13 *Hen. 7.* (a) which has been agreed to be law ever since, and has been the foundation of many subsequent determinations, it is said that if a man devise his estate to his heir at law after the death of his wife, the wife has an estate for life by implication; which shews that the estate which the heir has by descent may be abridged and lessened by implication only.

(a) *Fo. 17. pl. 22.*

1742.

GOODRIGHT
dem. GOOD-
RIDGE
against
GOODRIDGE.

I do not at all rely on *Beresford's* case 7 Co. 40, because that was the case of a feoffment to uses, and depended on so very great a nicety that it is no authority in the present case, and can hardly be cited as an authority in any case whatever, unless a deed of uses should happen to be penned exactly in the same words.

Having got rid of this distinction, I shall say no more but that the rule for the construction of these sort of wills is that which is laid down and agreed to by all the Judges in the case of *Spirt v. Bence*, Cro. Car. 368., "that the words of a will which disinherit an heir ought to have a clear and apparent intent, and not to be ambiguous or in any way doubtful;" and surely no words can be more plain and clear and less doubtful and ambiguous than the words of the present will are. Nay if this will were to be construed even according to *Vaughan's* rule, which I mentioned before, and which I think is carried too far (a), that there must be a necessary implication to disinherit an heir at law, I think that the words of the present will do necessarily imply that it was the testator's intent that his second son should have the estate in case his eldest died without heirs of his body.

If indeed the second son had died before the eldest, and the question had been between the devisee of the eldest and a son of the second son, there might have been some doubt: but at present we think there is none, and that therefore the lessor of the plaintiff must have the benefit of the verdict, and the postea must be delivered to him."

(a) Vid. *Moore d. Fagge v. Heafeman*, sup. 140, 141.

1742.

Saturday,
Nov. 20th.TWELLS *against* COLVILLE.

"A RULE nisi had been made on the motion of *Bootle* Serjt. for an attachment against a sheriff and his deputy for not taking a replevin bond upon his granting the replevin, pursuant to the directions of the statute 11 Geo. 2. c. 19 (a).

The Court refused to grant an attachment against a sheriff for not taking a replevin bond, on his granting the replevin.

Bootle Serjt. now agreed that the rule should be discharged as against the sheriff (b) (for whom *Willes* Serjt. was counsel,) and only

(a) The 23d section of which (in order to prevent vexatious replevins of distresses taken for rent) enacts that all sheriffs and other officers having authority to grant replevins may and shall in every replevin of a distress for rent take in their own names from the plaintiff and two responsible persons as sureties a bond in double the value of the goods distrained, conditioned for prosecuting the suit with effect and without delay and for duly returning the goods distrained in case a return shall be awarded before any deliverance be made of the distress; and then it authorises the sheriff &c to assign such bond to the avowant or person making cognizance &c.

(b) An action will lie against the sheriff not only for not taking a bond, but also for taking insufficient pledges. *Rous v. Patterson*, Hil. 13 Geo. 2. B. R. on a writ of error from C. B.; 16. Vin. Abr. 399. pl. 4; under the name of *Prowse v. Pattison*; Bull. N. P. 60. In such an action some evidence must be given by the plaintiff of the insufficiency of the pledges or sureties; but very slight evidence is sufficient to throw the proof upon the sheriff. *Saunders v. Darling*, Westminster sittings, Trinity 10 Geo. 3. C. B. Bull. N. P. 60.

—Though there have been contradictory determinations respecting the extent of the sheriff's liability in such an action, the point seems now to be settled. In *Prowse*

v. Pattison, the party recovered damages to the amount of the rent in arrear added to the costs of the replevin: but the whole together did not exceed the value of the distress. 4 D. & E. 434. So in the case of *Gibson v. Burnell*, 30 Geo. 3. Gould J., who tried the cause, was of opinion that the plaintiff was entitled to recover the costs in the replevin as well as the rent in arrear, *ib.* But in *Yea v. Lethbridge*, M. 32 Geo. 3, the Court of King's-Bench, on a question reserved at the trial for their opinion, held that the plaintiff could not recover beyond the value of the distress taken, which was not equal to the rent in arrear. 4 D. & E. 433. And though this decision was afterwards questioned in the Court of Common Pleas (1), in *Concanen v. Lethbridge*, E. 32 Geo. 3. 2 H. Bl. Rep. 36., where it was ruled after great consideration that the plaintiff might recover damages to the extent of the inquiry which he had sustained, though they exceeded double the value of the goods distrained; the authority of the case of *Yea v. Lethbridge* was again established in a subsequent case, *Evans v. Brander*, Tr. 35 Geo. 3., where the Court of Common Pleas (2) (three of the Judges being then changed) decided that the sheriff was not liable for more than double the value of the goods distrained 2 H. Bl. Rep. 547. The foundation of the last decision and of that

(1) That Court consisting of Lord Loughborough Lord Chief Justice, Gould J. Heath J. and Wilson J.

(2) Then consisting of Eyre Lord Chief Justice, Buller J. Heath J. Rooke J.

1742.

Twells
against
Colville.

only desired that it might be made absolute against *Abbot*, one of the sheriff's deputies who granted the replevin.

Agar Serjt. offered many things in excuse for *Abbot*, and desired to read several affidavits. But he insisted, among other things, that the Court had no authority to proceed in this summary way against the sheriff or his deputy as for a contempt, but that the party injured might bring his action against *Abbot* upon the act.

We thought it proper to have this matter thoroughly considered in the first place, before we read any affidavits, because reading the affidavits as to the fact would be in some measure admitting that we thought we had an authority to proceed in this summary way. The cause on the replevin had proceeded so far that there was judgment for the defendant, a *retorno habendo* awarded, and *elongata* returned.

I thought that this method of giving a bond having been practised many years instead of giving pledges, and being now substituted in the room of that common law method by the authority of the act of parliament, the proceeding ought to be in the same manner against the sheriff as it was before by *scire facias* or action on the case. And I put the counsel for the defendant to shew that an attachment was ever granted against a sheriff for not taking pledges. This is no contempt of the Court, but only a disobedience to the act. And I could not see how the Court could proceed in this method, unless the party had been guilty of a contempt.

My Brother *Parker* seemed to think otherwise, and that this was a similar case to the case of a sheriff refusing to pay a year's rent to the landlord according to the directions of the stat. 8 *An. c. 14.* when the goods of a tenant are taken in execution. For there though an action on the case will undoubtedly lie against

that of *Yea v. Lethbridge* is this; that the sheriff is liable no farther than the sureties would have been if he had done his duty by taking a bond under the stat. 11 *Geo. 2. c. 19.* and the sureties had been sufficient; and that the extent of their responsibility is limited by the statute to double the value of the goods distrained.

the sheriff, the Court upon the motion of the landlord usually proceeds (in order to save expence) by way of rule (a) against the sheriff, and if he disobeys it will grant an attachment.

1742.

TWELLS
against
COLVILLE.

But I thought that case very different from the present; because there if the sheriff takes the goods in execution and removes them before he pays the landlord his year's rent, the execution (which is the process of this Court) is irregularly executed, being executed contrary to law, and therefore the Court will interpose. But there is no process of this Court which directs a bond to be taken, nor would the Court stay the proceedings in replevin for want of the taking of such bond: but it is taken in pursuance of the directions of the act and not of this Court; and therefore though no bond be taken, there is no contempt of this Court.

My Brother *Burnett* seemed to think my distinction right.

However we gave no opinion, but ordered this point to be thoroughly considered and spoken to."

(On the last day of the term the rule was discharged.)

"And now (b) *Bootle* Serjt., to whom we had recommended it to see if he could find any precedent before the act of an attachment having been granted against a sheriff for not taking proper pledges, very fairly admitting that there was no such precedent, and that he thought the point was against him, desired that his own rule might be discharged (c)."

(a) Vid. *Henebett v. Kimpson*, 2 Wils. 140; *Darling v. Hill*, Rep. temp. Hardw. 255; *West v. Hedges*, Barnes 211; and *Andr* 219.

(b) On the last day of the term.

(c) In *R. v. Lewis*, Tr. 28 Geo. 3. The Court of King's Bench also refused to grant an attachment against the sheriff for not taking a replevin bond, 2 D. & E. 617. But in the case of *Richards v. Acton*,

2 Bl. Rep. 1220, the Court of Common Pleas, on a summary application, made a rule on the sheriff, under-sheriff, and the replevin clerk, who had refused to discover the names of the pledges taken on granting the replevin, to pay to the defendant in replevin the damages and costs recovered by him. See, however, Lord *Kenyon's* observation on that case in *Yea v. Lethbridge*, 4 D. & E. 435.

1742.

M. 16 G. 2.
Monday,
Nov. 29th.

HENRY GRILLS *against* MARY MANNELL, THOMAS
ELFORD and SAMUEL BUNT.

In replevin the defendant avowed &c, and stated in his avowry that by lease and release he in consideration of an annuity therein mentioned conveyed certain premises containing the place where &c to the plaintiff in fee, subject to a rent-charge payable to the defendant during her life, with power of distress for non-payment of the annuity; and that by virtue of the lease and release and by force of the statute &c the plaintiff became seised in fee &c; and then she justified &c as a distress for non-payment of the annuity. Pleas in bar; 1st that the plaintiff never was seised &c in fee; 2dly, (admitting that the defendant did by the lease bargain and sell &c to the

plaintiff for a year) that at the time of making the bargain and sale the defendant was only seised &c for her life, the reversion in fee then belonging to another, traversing that the defendant was seised of the reversion in fee.

On demurrer both pleas were holden bad; the first because it denied what was before admitted, and because it traversed only a consequence of law; the second, because it admitted that the defendant had an estate sufficient to justify the distress.

THE following opinion of the Court was given by

Willes, Lord Chief Justice. "Replevin; in which the plaintiff declares for taking one red ox, one brown ox, and two brown steers on the 28th of *March* 13 *Geo.* 2. at a place called *Trewoodla* at *Southill* in *Cornwall*, and detaining them &c. Damage 13 *l.*

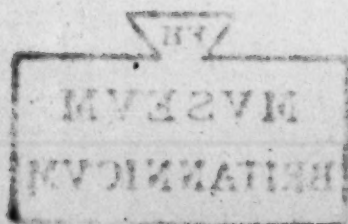
The defendant *Mary* avows in her own right, and the defendants *Thomas* and *Samuel* as her bailiffs acknowledge, the taking &c; because they say that long before the time when &c. viz. on the 25th of *March* 4 *Geo.* 2. by a certain indenture made between the said *Mary* and the plaintiff the said *Mary* for the consideration of a sum of money did bargain and sell to the plaintiff all that moiety or halfendal of all those messuages &c in *Trewoodla* in the parish of *Southill*, whereof the said close wherein &c then and long before was and is parcel, together with a certain parcel of common, and all other appurtenances &c to the said messuage &c belonging then in the occupation of the plaintiff, to hold from the day next before the date of the said indenture for one year; by virtue of which bargain and sale the plaintiff was possessed &c, the reversion thereof belonging to the said *Mary* and her heirs, and being so possessed and the reversion thereof belonging to the said *Mary* and her heirs as aforesaid she the said *Mary* afterwards and before the time when &c by another indenture made 26th of *March* 4 *Geo.* 2. between the said *Mary* and the plaintiff for and in consideration of the annuity therein mentioned to be paid to her from and out of the premises during her natural life and of 1 *s.* to her in hand paid by the plaintiff did release to the said plaintiff and his heirs for ever the said reversion with the appurtenances, to have and to hold the same to the plaintiff and his heirs, to the

use of him and his heirs for ever, subject to the payment of the rent-charge or annuity thereafter mentioned, that is to say, that it should and might be lawful for the said *Mary* and her assigns during the term of her natural life to have and receive one annuity or yearly rent-charge of 7*l.* 10*s.* of lawful money of *Great Britain* free from all taxes &c, and to be paid at the four most usual feasts, viz. the feast of *Saint John the Baptist* &c, by four even and equal portions; and by the said indenture it was agreed that if the said annuity of 7*l.* 10*s.* should be behind and unpaid twenty-one days after any or either of the said feast days &c it should and might be lawful for the said *Mary* and her assigns to enter upon the premises and to distrain &c; by virtue of which said lease and release and by force of the statute &c the plaintiff entered into and became seised of the premises &c in his demesne as of fee, subject &c; and the defendants justify taking the cattle by way of distress for 9*l.* 7*s.* 6*d.* arrears of rent due for a year and a quarter ending at *Christmas* 1739 and not paid within twenty-one days afterwards, wherefore they pray judgment &c.

1742.
GRILLS
against
MANNELL.

The plaintiff to the avowry, protesting that he never entered into the said premises by virtue of the lease and release, for plea saith that he never was seised of the said premises mentioned in the said indenture of release in his demesne as of fee; and this he prays may be inquired of by the country.

And for further plea by leave of the Court saith that true it is that the said *Mary* on the 25th of *March* 4 *Geo.* 2. did by her said indenture bargain and sell to the plaintiff a moiety or halfendal of all those messuages &c to hold from the day before the date thereof for one year, by virtue of which bargain and sale and the statute &c the said plaintiff became possessed of the premises &c; and further saith that at the time of making the said bargain and sale the said *Mary* was only seised of the said premises as of her freehold for the term of her life, the reversion thereof belonging to ——— *Mannell* and his heirs, who is seised thereof to him and his heirs; and traverses that *Mary* was seised of the reversion of the premises to her and her heirs in manner and form as the defendants in their avowry have acknowledged;



1742.

GRILLS
against
MANNELL.

acknowledged; and this the plaintiff is ready to verify &c; and prays judgment &c.

To both these pleas of the plaintiff the defendants demur generally, and the plaintiff joins in demurrer. And upon these two demurrers the cause comes now before the Court.

To the first plea there are two objections (a);

1st, That it denies what is before admitted;

2dly, That the traverse is only of a consequence of law.

And we are of opinion that the first plea is bad in both these respects.

First, Because the plaintiff has denied that he was seised in fee by virtue of the lease and release, though he has in effect admitted it before. For in this plea he has not denied, not even by way of protestando, that *M. Mannell* was seised in fee at the time of making the lease and release; and though he has denied it in his second plea, that will make no alteration, it being a known rule and never controverted that one plea cannot be taken in to help or destroy another, but every plea must stand or fall by itself. And as he has admitted in this plea that *Mary* was seised in fee, and that being so seised she made a lease and release to the plaintiff and his heirs, the necessary consequence of that is that he must be seised in fee by virtue of such lease and release; for I defy any one to put a case where a person seised in fee makes a lease and release to another and his heirs, and yet the grantee shall not be seised in fee; and yet this is the very thing denied by this plea.

Secondly, If there could be any doubt of this, (but there certainly is none,) the only doubt would be, whether this be the necessary consequence in law, that is, whether these deeds of lease and release have this operation in law or not. And it is a certain known rule, never that I know of once controverted, that a man cannot traverse a consequence of law; and for this plain reason because it is a matter of law and not of fact, and therefore not proper to be tried by a jury.

(a) The case was argued on the 22d of May preceding by *Draper* Serjt. in support of the demurrer and by *Gapper* Serjt. contra.

We



We are therefore clearly of opinion with the defendants that the first plea in bar of the avowry is not good.

1724.

GRILLS
against
MANNELL.

As to the second plea: it is a matter of much more difficulty; and upon the strength of the cases in *Dyer* and *Hobart* which were cited for the plaintiff, and which I shall take notice of by and by, I own I was at first of opinion that the second plea was a good bar to the defendant's avowry. But upon further consideration, and conferring with my Brothers, I have altered my sentiments. And we are all now of opinion that the second plea is not good, and that this case is plainly distinguishable from all the cases which were cited to support this plea. That a matter which is not material, if alleged by a plaintiff in a declaration or by a defendant in a plea or avowry, may be in many cases traversed by the other party, and that the estate in fee of the defendant *Mary* being alleged by her avowry (though she need not have said that she was seised in fee) may be traversed in the present case, we do not deny; and the cases which were cited go no farther.

In *Dyer* 280. pl. 15. nothing more was determined (and that not in the principal case but in a case that was there cited) than that a man may traverse a seisin in fee, when it is particularly alleged in an avowry. But in that case by way of inducement the plaintiff shewed that if the person were not seised in fee the defendant had no right to the rent avowed for; and it is the same case, or exactly to the same effect, which is afterwards reported in *Dyer* 312. pl. 90.

The case in *Dyer* 365. pl. 32., which was the case that was most relied upon, was thus. In replevin the defendants justified taking the cattle as bailiffs of Sir *Francis Leke* as being damage feasant in a close which was his freehold: the plaintiff pleads in bar that he was seised in fee of a close called *Butclose* adjoining to the said close of Sir *Francis Leke*, that Sir *F. Leke* &c of right ought to keep up the fences between these two closes, and that the cattle escaped into Sir *F. Leke*'s close by reason that those fences were out of repair. The defendants in their replication, protesting that there was no such right of inclosure, for plea say that the said close called *Butclose* was the soil and

1742.
 GRILLS
 against
 MANNELL.

freehold of the Earl of *Sbrewsbury*, and traverse the plaintiff's being seised in fee; and it was holden to be a good traverse, because though the plaintiff need not have set forth that he was seised in fee, (for if he had said that he had only an estate for life, for years, or at will, it had been sufficient to have supported his plea) yet if he will give his adversary this advantage by alleging that he had an estate in fee which he need not have done, the Court were of opinion that the traverse was good. But it is observable in that case that the defendants were so far from admitting in their plea that the plaintiff had an estate for life, for years, or at will, that they expressly said that the soil and freehold was in another, which I shall shew presently distinguishes it from the present case.

What is said in the case of *Digby v. Fitzherbert*, *Hob.* 103. is merely founded on these cases in *Dyer*, and does not carry it a jot farther; nor do I know that it has been carried farther in any case whatever.

But in the present case the plaintiff is so far from denying that the defendant *Mary* had an estate sufficient to justify the distress, that in his plea by way of inducement to his traverse he expressly admits that she had an estate for life at the time of her making the lease and release, and that she is still living. It appears on the whole record, by the plaintiff's own admission, that the distress was well taken; for though the plaintiff's traverse were true, that she had only an estate for life and not an estate in fee, if she had an estate for life the rent was due and payable to her during the continuance of that estate. If indeed by way of inducement he had said that the estate was in another, or that *Mary* was possessed only of a term for years which was expired, this would have altered the case. But as he has admitted that she had an estate for life, this plainly distinguishes it from all the cases that were cited on this head.

To this I think there can be but three objections made, one of which was made at the bar;

First; That the lease and release made by *Mary*, being only tenant for life, to the plaintiff and his heirs was a forfeiture of her

her estate for life; and so the plaintiff took nothing by the grant, and therefore was not obliged to pay the rent.

The other two objections not made at the bar are,

Secondly, That this was a cheat on the plaintiff, who would not probably have agreed to pay so much rent during the life of *Mary* but in consideration that he was to have the estate to him and his heirs after her death, and that this is expressly laid in the avowry to be the consideration of the deed of release;

Thirdly; That it is only said by way of inducement that *Mary* was tenant for life, and that what is said only by way of inducement is not material.

To the first objection there are two answers;

1st; That if the lease and release did create a forfeiture, it would be no objection in the mouth of the plaintiff until he was actually evicted. For so long as he continues in possession, he ought to pay the rent; and he has not shewn or pretended any eviction.

2dly, The second answer is that a lease and release by a tenant for life do not create a forfeiture; and the cases which were cited prove no such thing. For in 1 *Co.* 140; *Cro. Eliz.* 131; 1 *Leon.* 125; and 1 *Rol. Abr.* 854; it is only held that a *feoffment* in fee by tenant for life is a forfeiture of his estate, which is certainly true, of a *feoffment*: but by lease and release (a), by which a man only conveys that which he has a right to convey, there is no forfeiture created. And so it is expressly said in *Co. Lit.* 328. a.; and it is so established a rule in all the books that I need not cite any other case to support it.

As to the second objection: it does not appear on the pleadings whether the rent reserved be more than the yearly value of the estate. If not, there is nothing in the objection: but if it be, it is no objection at law; but the deed will be equally good and the rent payable during the continuance of the estate for life, though it may perhaps be a foundation for relief in equity.

(a) See *Seymour's case*, 10 *Co.* 95; | and *Doe d. Neville v. Rivers*, 7 *D. & E.*
Machell v. Clarke, 2 *Ld. Raym.* 779; | 276, as to the effect of a lease and release
Doe d. Tyrrel v. Shilson, 3 *Burr.* 1703; | by a tenant in tail.

1742.

GRILLS
against
MANNELL.

As to the third objection: it depends entirely upon this, whether what is said in the inducement to the traverse be material or not. And we are all clearly of opinion that it is so. And so it plainly appears to be by the case of *Sir Walter Sands v. Lane*, Cro. Eliz. 667, and several other cases.

Judgment therefore must be for the defendants."

"N. We did not consult my Brother *Fortescue A.*, he not being in Court at the arguing of the case; but Mr. J. *Parker*, who this day kissed the King's hand for the office of Lord Chief Baron, agreed with my Brother *Burnett* and me."

M. 16 G. 2.
Monday,
Nov. 29th.

The Master, Wardens, and Society of the Mystery
of GUNMAKERS of the City of LONDON against
STEPHEN FELL.

A bye-law
made by the
Gunmakers'
Company
"that no
member
should sell
the barrel of
any hand-gun
&c ready
proved to
any person of
the trade, not
a member, in
London or
within four
miles; and
that no mem-
ber should
strike his
stamp or
mark on the
barrel of any
person not a

THE opinion of the Court was delivered as follows by

Willes, Lord Chief Justice. "Debt; in which the plaintiff set forth the charter 14th of *March 13 Car. 1.*, by which the Company was incorporated, which recites the great inconvenience that happens to the public by unskilful persons making trying and proving guns, and for reformation of such abuses and in order that the trade may be carried on in a proper and skilful manner the King constitutes and appoints several persons therein named and all others then using or who should thereafter use the art of gunmaking within the city of *London* or within four miles compass thereof, and all such others as should be accepted and admitted in such manner as in the said letters patent is expressed, to be a body corporate by the name of the master war- member of the Company &c, under a penalty of 10s. for each offence," was holden not good, as being in restraint of trade; it not appearing from any thing set forth in the declaration that there was any adequate reason for these restraints or any consideration to the persons restrained.

—General restraints of trade are bad: particular restraints, either as to time or place, are good, if for a sufficient consideration.

—A bye-law, made by the Gunmakers' company, inflicted a penalty, half to the use of the poor of the Company, and half to the use of the discoverer, without saying who was to sue for it; whether the Company may not sue for the penalty? Qu.

—In an action for a penalty for breach of a bye-law, whether it should not be positively stated that the defendant was subject to the bye-law when he did the act complained of? Qu.

—And whether it be sufficient if it be stated to have been done on a day (after a viz.) after he was subject to the bye-law, as it appears on other parts of the declaration? Qu.

dens and society of the mystery of gunmakers of the city of *London*; and gives them several powers, and (amongst the rest) a power for the said master wardens and assistants of the society of gunmakers for the time being or the greater part of them, whereof the master and one of the wardens to be two, to make ordain and constitute such reasonable acts orders decrees and ordinances in writing as to them should seem meet for and concerning the art trade and mystery of gunmaking and the well ordering and government thereof within the said city of *London* or the liberties thereof and within four miles of the same, and also for the reformation of such abuses and deceits from time to time in uttering inartificial unmerchantable bad and deceitful guns, or parts of guns &c, whereby his Majesty's subjects might be damnified or endangered &c, and to inflict pains and penalties by fines &c for the breach of such bye-laws &c. The plaintiffs further set forth that the said charter was accepted and hath been ever since acted under. And that at a court of the master wardens and society aforesaid commonly called a Court of Assistants held 10th of *October* 1672 by and before *Robert Murden* then and there being the master and *Joseph Stace* and *Robert Tough* then and there being the wardens of the said society, and fourteen others, (named in the declaration) being a greater part of the assistants of the said society, the said master wardens &c did make ordain and publish a certain ordinance or bye-law in writing for the good rule and government of the said Company, and did thereby order "that from thenceforth no sworn member of the said Company should sell or deliver by way of sale the barrel of any manner of hand-gun dagg or pistol ready proved to or to the use of any person whatsoever of the said art within the said city or liberties or four miles compass thereof who is not admitted and sworn a member or free brother of the said Company, nor should strike or suffer to be struck his proper stamp or mark upon the barrel or barrels of any such person not admitted and sworn; upon pain of forfeiture of 10*s.* for every such barrel; a moiety thereof to the use of the poor of the said Company, and a moiety to the use of the discoverer, and a stop made of his proof till conformity or payment."

The plaintiffs aver that such ordinance was and is good and reasonable, and not repugnant to the laws or statutes of the

1742.

The Master
&c of Gun-
makers &c
against
FELL.

1742.

The Master
&c of Gun-
makers &c
against
repl.

kingdom, nor to the customs or usages of the city of *London*; and they assign for breach, first, that the defendant long after the making of the said letters patent, to wit, on the 27th of *June* 1728 was admitted into the said Company and sworn a member thereof, and from thenceforth hitherto hath continued a member thereof, and for all the time aforesaid hath used and exercised the art of gunmaking at *London* aforesaid, and then and there had notice of the said bye-law; and that the said defendant long after the making of the said bye-law, to wit, on the 1st day of *June* in the year 1739 at *London* aforesaid sold a great number of barrels of hand-guns, to wit, sixty barrels of hand-guns ready proved to one *John Halfbide*, which said *John Halfbide* at the time of the sale thereof did use and exercise the said art of a gunmaker within the said city of *London*, and who at the time of the sale of the said gun-barrels was not admitted and sworn a member or free brother of the said society, contrary to the form of the said ordinance; whereby the said defendant hath forfeited and ought to pay to the plaintiffs 30*l.* to wit, 10*s.* for each of the said barrels of hand-guns so sold by him to the said *Halfbide* as aforesaid, whereby an action hath accrued to the said plaintiffs to demand and have of the said defendant the said 30*l.* parcel of the said 60*l.*

Secondly, They assign for breach that the said defendant after the making of the said ordinance, to wit, on the 2d day of *June* in the year 1739 at *London* aforesaid he the said defendant then and there being admitted and sworn a member of the said Company did suffer to be struck his proper stamp or mark upon a great number of barrels of hand-guns, to wit, upon sixty barrels of hand-guns of the said *John Halfbide*, which said *John Halfbide* at the time of the striking of such stamp or mark upon the said barrels of hand-guns did use and exercise the said art of a gunmaker within the city of *London*, and who at the time of the striking of the said stamp or mark was not admitted and sworn a member of the said company, contrary to the form of the ordinance aforesaid; whereby and by force of the said bye-law the said defendant hath forfeited and ought to pay to the said master wardens and society 30*l.*, to wit, 10*s.* for each of the said barrels so struck with the said stamp or mark; whereby an action hath accrued to the said master wardens and society to

demand and have of the said defendant the said 30 $\frac{1}{2}$ residue of the said 60 $\frac{1}{2}$; nevertheless the said defendant, although he hath been often requested, hath not rendered to the said master wardens and society the said 60 $\frac{1}{2}$ or any part thereof, but hath wholly refused and still doth refuse to render the same; and the said master wardens and society say that they are damnified to the value of 70 $\frac{1}{2}$; and therefore they bring suit &c.

1742.

The Master
&c of Gun-
makers &c
against
FELL.

The defendant says that the declaration of the said master wardens &c and the matters therein contained are not good and sufficient in law for the said master &c to have or maintain their said action against him; to which declaration and the matters therein contained he the said defendant is not under any necessity nor bound by the laws of the land to make answer, and this he is ready to verify; wherefore for want of a sufficient declaration in this behalf he prays judgment, and that the said master wardens and society of the mystery of gunmakers of the city of London may be barred from having or maintaining their action aforesaid against him the said defendant.

The plaintiffs join in demurrer, and pray judgment, and their said debt, together with the damages by reason of detaining the said debt, to be adjudged to them.

And upon this demurrer to the plaintiffs' declaration the cause comes now in judgment before the Court.

There have been three objections (a) taken to the plaintiffs' declaration;

1st, That the bye-law, on which the action is founded, is not good;

2dly, That, if it be, the breaches are not well assigned.

3dly, That, if the bye-law be good and the breaches well assigned, the action cannot be brought in the name of the corporation.

(a) This case was argued on three several days, 19th of June 1740, 10th of June 1741, and 23d of June 1742, by Prime King's Serjt. and Urrin Serjt. in

support of the demurrer, and by Birch King's Serjt. and Draper Serjt. for the plaintiffs.

As

1742.

The Master
&c of Gun-
makers &c
against
FELL.

As to the first objection, we are of opinion, and so are my Brother *Fortescue* and my late Brother *Parker*, (now Lord Chief Baron) that the bye-law is not good as set forth in this declaration. It is very probable that if other parts of the charter and other bye-laws of the corporation were set forth, it might appear to be a good bye-law: but we can take notice of nothing but what is set forth in the pleadings.

The general rule is that all restraints of trade, (which the law so much favors,) if nothing more appear, are bad. This is the rule which is laid down in that famous case of *Mitchell v. Reynolds*, which is very well reported in 1 *P. Wms.* 181; in which Lord *Macclesfield* took such great pains, and in which all the cases and arguments in relation to this matter are thoroughly weighed and considered; and therefore I will not repeat them to you again in worse words, but refer you to that report, where you may see all the cases cited which relate to this point, and where it is considered in every light in which I think it is possible to consider it.

But to this general rule there are some exceptions; as first that if the restraint be only particular in respect to the time or place (*a*), and there be a good consideration given to the person restrained, a contract or agreement upon such consideration so restraining a particular person may be good and valid in law, notwithstanding the general rule; and this was the very case of *Mitchell v. Reynolds*, where such a bond was holden to be good. So likewise if the restraint appear to be of a manifest benefit to the public, such a restraint by a bye-law or otherwise may be good. For it is to be considered rather as a regulation (*b*) than

a re-

(a) See the cases of *Clerke v. Comer*, *Cas. temp. Hardw.* 53; *Chefman v. Nainby*, 2 *Str.* 739, *Fortesc.* 297; 2 *Ld. Raym.* 1456, and 3 *Bro. Parl. Cas.* 349; and *Davis v. Mason*, 5 *D. & E.* 118.; in the two former of which an agreement by an apprentice, in consideration of being taught his trade, not to carry on the same trade, in one instance within half a mile of the master, and in the other within the

bills of mortality, under a penalty, was holden to be a valid agreement. The last case was that of an assistant to a surgeon.

(b) See the following cases respecting bye-laws made by public companies, and what bye-law is considered only as a regulation, and what as a restraint, of trade; *Freemantle v. The Company of Silkbrowsters*, 1 *Lev.* 229; *Cuddon v. Eastwick*, *Salk.*

a restraint; and it is for the advantage and not the detriment of trade that proper regulations should be made in it. And it is plain by the recitals of this charter granted to the Gunmakers' Company that this was the very purpose for which this corporation was created.

1742.
The Masters
&c of Gun-
makers &c
against
FELL.

It is therefore by this rule and this exception that we must try the present case. And first it is certain that both these bye-laws (a) are restraints upon trade, and therefore bad unless they fall under the exception. To oblige a man after he has finished his barrels not to sell them to any one (b) but one who is admitted of the Company is a great restraint upon trade. So likewise not to put his mark or to suffer his mark to be put upon the barrel of any person not admitted of the Company is a very great hardship and restraint, unless there were a particular reason for it. But it does not appear from any thing that is set forth in the declaration that the charter has given any directions, or the Company made any bye-laws, concerning the regulation of that particular branch of the trade of fitting the barrels into the stocks; and if not, no reason can be assigned why other persons may not do it as well, and should not be permitted to do as it well, as those who are members of the Company. Nor does it appear by the declaration that the particular marks which every person of the Company puts on his own barrels are an evidence that such barrels have been tried and proved by the Company, or that such marks may not be put on before they are tried and proved, or that there is any method whatsoever prescribed either by the charter or any bye-laws for trying and proving barrels made by members of the Company. And as we can presume nothing but what is set forth, we are obliged to be of opinion that this part of the bye-law

Salk. 193; *Wannell v. The Chamberlain of the City of London*, 1 Str. 675; *Bosworth v. Hearne*, 2 Str. 1085, & Andr. 91; *Harrison v. The Chamberlain of London*, 1 Burr. 12; *Green v. The Mayor of Durham*, ib. 127; *The King v. The Master and Wardens of the Surgeons Co. in London*, 2 Burr. 892; *The King v. Sir T. Harrison, Chamberlain of London*, 3 Burr. 1322; *Pierce v. Bartrum, Cowp.* 269; and *The Butchers' Company v. Morey*, 1 H. Bl. Rep. 371.

(a) In truth it is only one bye-law, consisting of two branches.

(b) The bye-law is not so extensive; it merely restrains the members of the Company from selling barrels "to any person of the said art within the said city or liberties or four miles compass thereof" who is not a member.

1742.

The Master
&c of Gun-
makers &c
against
FELL.

likewise is not good, as being a restraint upon trade without an apparent reason.

The objection to the latter part of the bye-law, that a stop is to be made of proof until conformity or payment of the penalty, though we think it a good objection, affords no argument at all in the present case, because a bye-law may certainly be good in part (a) and bad in part; and this action is not founded on that part of the bye-law.

As therefore we are of opinion that the bye-law, on which this action is founded, is not good in either part of it, the two other objections become altogether immaterial; and therefore I shall say but very little upon them.

As to the objection that the breaches are not well assigned; we are rather inclined to think that the first breach is not well assigned, because it does not appear that the defendant was guilty of the fact there laid to his charge after he was a member of the Company, unless the day which follows after the words, to wit, be material (b); which we think it is not.

There are many cases in the books relating to this matter, but I think that no certain rule can be laid down concerning it, but the Judges must judge as well as they can from the nature of every particular case. I will mention only two instances to explain what I mean. In the case of an action on a promissory note, it is generally laid in the declaration that after the day of the making of the act, to wit, upon such a day such a note was made; in which case the very day set forth after the, to wit, is certainly material, because the same identical note must be proved; and it can be ascertained only by the date; and if it be of another date, it is another note. But in the case of a declaration in ejectment, where the demise is laid upon such a day, and the declaration goes on and says that afterwards, to wit, upon such a day the defendant ejected the plaintiff, this day is not material, because if the defendant

(a) But see *Clarke v. Tuckett*, 2 Ventr. 183.

(b) Vid. *Skinner v. Andrews*, 1 Saund. 169.

ejected

ejected him upon any day after the day of the demise, it is sufficient. And if the day of the ejectment be laid to be before the day of the demise, it must always be rejected as repugnant and immaterial, but does not vitiate the declaration. But this objection only lies to the first breach assigned; for the second is right in this respect.

But there is another objection that goes to both the breaches, that it is not laid that the defendant at the time of the breaches *knew the persons* there mentioned not to be members of the Company. Whether or no it is necessary that this should have been so laid, we give no positive opinion, because it is not necessary. To be sure, if it were in an indictment it would be necessary to lay it so; and we think at least that it would have been better if it had been so laid in the present case.

There is but one objection that remains, which is that the Company could not sue in their own name for these penalties, because there is no direction in the bye-law, and besides the penalty is not given to them but to other persons, that is, a moiety to the use of the poor of the Company and a moiety to the discoveror (a). But we are inclined to think that if the bye-law were good, and the breaches well assigned, the action might be brought in the name of the Company (b). *The Chamberlain of London's case*, 5 Co. 62. b., 1 Rol. Abr. 366. (C), and what is said in the case of *Player and Vere*, Sir T. Raym. 324., are very strong authorities in support of this opinion. But, as it is not necessary at present, we give no positive opinion upon this point.

Upon the whole therefore, though we were very much inclined (as far as justice would permit) to give judgment for the plaintiffs, being satisfied that they are a very useful Com-

(a) The action could not have been brought by any discoveror; for though a body politic may make a bye-law, subjecting those who infringe it to a penalty, they cannot give an action to a stranger to recover such penalty. *Bodwin v. Fennell*, 1 Wils. 237; and *Totterdell and Harris, Masters of the Taylors' Co. at Bath*, v. Glazby, 2 Wils. 266.

(b) In the case of *The Master Wardens and Commonalty of Feltmakers v. Davis*, Bos. & Pull. 98, it was holden that the master wardens and commonalty of a company could not sue for a penalty forfeited to the master and wardens, to the use of the master wardens and company.

1742.

The Master
&c of Gun-
makers &c
against
FELL.

pany,

1742.
The Master
&c of Gun-
makers &c
against
FELL.

pany, and that it is of great consequence to the public that the art of gunmaking should be put under proper regulations, yet we are obliged in justice to be of opinion that this bye-law is not sufficiently supported by any thing that is set forth in the declaration, and that therefore judgment must be for the defendant."

H. 16 Geo. 2.
Thursday,
Jan. 27th.

WILLIAMS qui tam against DREWE.

The stat. 18
Eliz. c. 5. f. 3.,
which gives
costs to de-
fendants in
popular
actions if the
plaintiff be
nonsuit, ex-
tends to sub-
sequent as
well as prior
statutes.

"**MOTION** (a) for costs on the plaintiff's being nonsuited. Action of debt for 200*l.* by the plaintiff as a common informer on the stat. 15 *Car.* 2. c. 8. made to prevent butchers selling live cattle; penalty double the value of the cattle; one half to the King, the other to the informer. No costs given by the statute to the informer. Nil debet was pleaded; and the plaintiff was nonsuited at the last *Cornwall* assizes.

The motion is grounded on the 18 *Eliz.* c. 5. f. 3. And the only question is whether that statute extends to forfeitures and penalties created by any subsequent statutes.

It was said that the statute of *Charles* the Second has only enforced the statute 3 & 4 *Ed.* 6. c. 19., by enlarging the penalties and a little altering the nature of the offence. It was said also that there is not one word in the stat. 18 *Eliz.* which implies that it relates only to offences created before that time. And for the defendant was cited *Pie's* case, *Hutt.* 25, which was in 17 *Jac.* 1. The information was on the 35 *Eliz.* c. 6, which was a temporary act; and the question was whether the defendant being found not guilty (b) was entitled to costs; and said there that this statute 18 *Eliz.* was a perpetual direction to all informers. *Doghead's* case, 2 *Leon.* 116. Information on the 27 *Eliz.* c. 4; plaintiff nonsuited; and there held that, the plaintiff not being a common informer, the defendant was not (c) entitled, but no objection that it was on a subsequent statute. 2 *Keb.* 106; and 1 *Sid.* 311. An indictment for compounding an information without the leave of the Court, and said that this Court had on this statute made many rules to compound

(a) By *Draper* Serjt.

(b) He was found guilty, but the judgment was arrested.

(c) But see *The Mayor &c of Plymouth* v. *Werring*, *Hil.* 17 *Geo.* 2. C. B. post.

penalties created by subsequent statutes; which shews that another clause of this statute has been holden to extend to subsequent statutes, though there are no stronger words there than in the present clause. *Harris q. t. v. Reeve* in *B. R.*; and *Lamb q. t. v. Fetherston*, *M. 10 Geo. 2.*

1742, 3.
WILLIAMS
against
DREWS.

Belfield desired time to shew cause. So rule nisi, which was afterwards made absolute (a); *Belfield* saying that he did not oppose it."

(a) *Law q. t. v. Worrall*, 1 *Wils.* 177; *Carter q. t. v. Tooting*, *M. 12 Geo. 1.* there cited; and *The Mayor &c. of Plymouth v. Werring*, *post*, S. P.;—See also the case of *Wilkinson q. t. v. Allot*, *Cowp.* 366, where the plaintiff having been non-

sued in an action on the stat. 21 *Hen. 8. c. 13*, for nonresidence, it was holden that the defendant was entitled to costs, though it was objected that the stat. 18 *Eliz. c. 5.* did not extend to those cases where a moiety of the penalty is given to the King.

JOHN COLEHAN against JOHN COOKE.

H. 16 Geo 2.
Thursday,
Feb. 10th.

THE following opinion of the Court was delivered by

Willes, Lord Chief Justice. "Motion in arrest of judgment. The first count is on a promisory note dated 27th of *May* 1732, whereby the defendant promised to pay to *Henry Delany* or order 150 guineas ten days after the death of his father *John Cooke* for value received; which note after the death of the father (which is laid to be the 2d of *April* 1741) was duly indorsed by *Delany* to the plaintiff. The second count is on a promisory note dated the 15th of *July* 1732, whereby the defendant promised to pay to *H. Delany* or order six weeks after the death of his father 50 guineas for value received; the like indorsement laid after the death of the father as before. The third count is for money had and received &c 250*l.*: but this is out of the case. The damage is laid at 300*l.*; and a general verdict for the plaintiff on both notes.

A promisory note payable to *A.* or order after the death of *B.* is assignable under the stat. 3 and 4 *An. c. 9*; and consequently the indorsee may maintain an action upon it against the maker.

It was insisted (a) on for the defendant in arrest of judgment that these notes are not within the stat. 3 & 4 *Anne c. 9*; and

(a) This case was several times argued.

5 H

if

1742, 3.

COLMAN
JAMES
COOK.

if not that they are not indorstable or assignable, and consequently that the plaintiff who brings this action as indorsee cannot recover at law. To shew that these notes are not within the statute a great many things were said on the arguing of the case, and a great many cases and authorities cited both out of the common and civil law books. But I think that all the objections that were made may be reduced to these two general positions;

1st, That the act of parliament only intended to put promissory notes on the same foot as bills of exchange; and that therefore, if bills of exchange drawn in this manner would not be good and consequently not assignable, it follows that notes drawn in this manner are not made indorstable or assignable by the statute.

2dly, That the act was made for the advancement of trade and commerce, and consequently was intended to extend only to such notes as are in their nature negotiable, and that these notes are not so.

Before I consider these objections, I will state the words of the act of parliament on which the question must depend, 3 & 4 An. c. 9. intituled "An act for giving like remedy on promissory notes as is now used on bills of exchange, and for the better payment of inland bills of exchange." Whereas it hath been held that notes in writing signed by the party who makes the same, whereby such person promises to pay to any other person or his order any sum of money therein mentioned, are not assignable or indorstable over within the custom of merchants, and that any person to whom such note shall be assigned indorsed or made payable could not within the said custom maintain any action on such note against the person who first drew and signed the same, therefore to the intent to encourage trade and commerce which will be much advanced if such notes shall have the same effect as inland bills of exchange and shall be negotiated in like manner, be it enacted that all notes in writing which shall after &c be made and signed by any person or persons &c whereby such person or persons do or shall promise to pay to any other person or persons &c his her or their order or unto the bearer any sum of money mentioned in such note shall be taken and construed by virtue thereof due and payable to any such person or persons &c to whom the same is made payable, and

and also every such note shall be assignable or indorsable over in the same manner as inland bills of exchange are or may be according to the custom of merchants; and that the person or persons &c to whom the sum of money is made payable by such note shall and may maintain an action for the same in such manner as he she or they may do upon any inland bill of exchange &c; and that the person or persons &c to whom such note is indorsed or assigned, or the money therein mentioned ordered to be paid by indorsement thereon, shall and may maintain his her or their action for such money either against the person or persons who signed such note, or against any of the persons who indorsed the same, in like manner as in case of inland bills of exchange. The title of the act seems to refer to bills of exchange, and they are likewise referred to in the preamble, and the remedy is to be the same (a). But in the description of the notes which are to be made assignable there is no reference to bills of exchange; but the words are very general, and I never understood that the plain words of an enacting clause are to be restrained by the title or preamble of an act (b). It has indeed been often said, and I think very rightly, that if the words of an act of parliament be doubtful, it may be proper to have recourse to the preamble to find out the meaning of the Legislature: but where the words of the enacting part are plain and express, I do not think that they ought to be restrained by the preamble; for the preamble may only recite some particular mischiefs which have happened, but the enacting clause may not only be calculated to prevent those mischiefs but others also of a like nature. Now the words of the enacting part of this act are plain and clear and very general; and in order to bring a note within the description of that clause, it is only necessary,

1742, 3.

COLEMAN
against
COOKE.

(a) It was taken for granted in *Tindal v. Brown*, 1 D. & E. 167; 2 D. & E. 186; both in the Court of King's Bench and in the Exchequer-Chamber, and solemnly decided in the cases of *Brown v. Harraden*, ib. 4 vol. 148, and *Smith v. Kendal*, ib. 6 vol. 123, (in which the dictum of Denison J. in *Dexlaux v. Hood*, Bull. N. P. 274, and the determination in *May v. Cooper*, Fost. 376, to the contrary were over-ruled) that three days' grace are allowed on a promissory note (though it be a note pay-

able to A. without adding "or to his order, or to bearer," *Smith v. Kendal*, 6 D. & E. 123.) as well as on a bill of exchange, by reason of the stat. 3 & 4 An. c. 9, which puts them both on the same footing in all respects.

(b) Vid. *Copeman v. Gallant*, 1 R. Wms. 320; *Mace v. Cadell*, Cowp. 232; *Pattison v. Bankes*; ib. 543; *Cox v. Liottard*, H. 24 Geo. 3. Dougl. 167. n. (55), oct. ed.; and *Bradley v. Clarke*, per Buller J. 5 D. & E. 201.

1742, 3.

CONEMAN
against
COOKE.

1st, That the note should be in writing;
2dly, That it should be made and signed by the person
promising to pay;

And 3dly, That there be an express promise to pay to another
or his order or bearer. But as to the time of payment, the act
is silent, nor is there any particular form prescribed.

And therefore, as to the first objection, that if a bill of ex-
change had been drawn in this manner it would not have been
good; supposing it to be true, I do not think that it follows that
these promissory notes may not be within the general words of
the statute, if they answer all the descriptions therein contained.
However for argument's sake I will suppose that this consequence
would hold: but we do not think that a bill of exchange drawn
in this manner would be bad. Upon this head it would be but
mispending time to run over all the passages which have been
cited out of the civil law books in relation to bills of exchange,
because I put a question to the counsel which will I think de-
termine this point, whether there is any limited time mentioned
in any of the books beyond which if bills of exchange are made
payable they are not good, and it was agreed by the counsel that
they could find no such rule, and I am sure I can find none.
But if a bill of exchange be made payable at never so distant a
day, if it be a day that must come, it is no objection to the bill.
There is but one passage in the books wherein any notion to the
contrary is so much as hinted at; and that is in *Scacchius de*
commerciis, where it is said that it had been *formerly* an objection
against a bill of exchange, as contrary to the nature of it, that
it was made payable at the end of seven months: but by his
making use of the word *formerly*, it is plain that in his opinion
the law was then held to be otherwise. If therefore the distance
of time would not have made a bill of exchange bad if drawn in
this manner, since it is drawn at a time which must come, the
only other objection that was made on this head was that in all
bills of exchange there must be a *par pro pari*, which there can-
not be in this case, because the value cannot be ascertained.
But I shall shew plainly that the value may be ascertained, when
I come to the other objection that these are not negotiable notes.

Secondly; Having answered the objections against these notes
considering them on the same foot as bills of exchange, I come
now

now to the second objection, arising from the words and intent of the statute. And first I think that they are plainly within the words. They are made in writing; they are signed by the person promising to pay, and there is an express promise to pay to another or his order; and as no time of payment is mentioned in the statute, the distance of time is no objection within the words of the act.

1742, 3.

COLEMAN
against
COOKE.

Let us see therefore in the next place whether any objection arises against them from the design and intent of the act; though I think it would be pretty hard to construe a note to be not within the intent of an act when it is manifestly within the words of it, and the words of the act are plain and express. When the words of an act are doubtful and uncertain, it is proper to inquire what was the intent of the Legislature: but it is very dangerous for Judges to launch out too far in searching into the intent of the Legislature, when they have expressed themselves in plain and clear words. However we think that these notes are within the intent as well as the words of the act. And to shew that they are so, I will here take notice of all the cases which were cited to the contrary, and will shew that they all stand on a different foot and are plainly distinguishable from the present. For they are all of them cases where either the fund out of which the payment was to be made is uncertain, or the time of payment is uncertain and might or might not ever happen: whereas in the present case there is no pretence that the fund is uncertain, and the time of payment must come, because the father after whose death they are made payable must die one time or other. The case of *Pearson v. Garrett*, 4 *Mod.* 242. and *Comb.* 227. was thus; the defendant gave a note to pay 60 guineas when he married *B.*, and judgment was given for the defendant, because it was uncertain whether he would ever marry her or not, so the time of payment might never come. In the case of *Jocelyn v. Le Serre*, *P. 1 G. 1. B. R.* (a), the bill was drawn on *Jocelyn* to pay so much every month-out of his growing subsistence; how long that would last no one could tell, or whether it would be sufficient for that purpose; and therefore the bill was holden not to be good, because the fund was uncertain. In the case of *Smith v. Boheme* (b), *M.*

(a) Reported in 10 *Mod.* 294. and in 8 *Mod.* 364.
316; and cited in 2 *Lord Raym.* 1362, (b) Cited in 2 *Lord Raym.* 1362.

1742, 3.

COLEMAN
against
COOKE.

1 G. 1. B. R., the promise in the note was to pay 70*l.* or surrender a person therein named: if therefore he surrendered the person, there was no promise to pay any thing, and therefore the note was uncertain and not negotiable. In the case of *Appleby v. Biddulph*, P. 2 Geo. 1. (a), a promise to pay if his brother did not pay by such a time; held not to be within the statute, because it was uncertain whether the drawer of the note would ever be liable to pay or not. In the case of *Jenny v. Herle* (b), Tr. 10 Geo. 1., a promise to pay such a sum out of the income of the Devonshire mines, held not a promise within the statute, because it was uncertain whether the fund would be sufficient to pay it. So in the case of *Barnsley v. Baldwyn*, P. 14 Geo. 2. B. R. (c), the promise was, as in the case of *Pearson v. Garrett*, to pay such a sum on marriage; and held not to be within the statute for the same reason. And as these notes are plainly not within the intent of the statute because not negotiable ab initio, so when the words themselves come to be considered they are not within the words of it, because the statute only extends to such notes where there is an *absolute promise* to pay and not a promise depending on a contingency, and where the money at the time of the giving of the note becomes *due and payable by virtue thereof* (so are the words of the statute), and not where it becomes *due and payable by virtue of a subsequent contingency* which may perhaps never happen, and then the money will never become payable at all. And it can never be said that there is a promise to pay money, or that money becomes due and payable by virtue of a note, when unless such subsequent contingency happen the drawer of the note does not promise to pay any thing at all (d).

But the present notes, and those cases where such notes have been holden to be within the statute, do not depend on any such contingency, but there is a certain promise to pay at the time of the giving of the notes, and the money by virtue thereof will certainly become due and payable one time or other, though it is uncertain when that time will come. The bills therefore of

(a) Cited in 8 Mod. 363.

(b) Reported in 2 Lord Raym. 1361.

(c) Since reported in 7 Mod. 417. oct. ed.; and in 2 Str. 1151. by the name of *Beardesley v. Baldwin*.(d) But there may be a conditional acceptance of a bill of exchange. *Smith v. Abbot*, 2 Str. 1152; *Julian v. Shobrooke*, 2 Wils. 9; *Pierston v. Dunlop*, Cowp. 574; and *Spreat v. Matthews*, 1 D. & E. 182.

exchange

exchange commonly called *Billæ nundinales* were always holden to be good, because though these fairs were not always holden at a certain time, yet it was certain that they would be held. The case of *Andrews v. Franklyn (a)*, H. 3 Geo. 1. B. R., depends on the same reason; for there the note was to pay such a sum two months after such a ship was paid off; and held good, because the ship would certainly be paid off one time or other. The case of *Lewis v. Ord (b)*, T. 8 & 9 G. 2. B. R., was exactly the like case, and determined on the same reason. As to the objection that these are not negotiable notes, because the value of them cannot be ascertained, the argument is not founded on fact, because the value of a life when the age of a person is known is as well settled as can be; and there are many printed books in which these calculations are made. But if it were otherwise, the life of a man may be insured, and by that the value will be ascertained. And the same answer will serve to the objection which I before mentioned against such bills of exchange.

1742, 3.

COLEMAN
against
COOKE.

There was another objection taken, that the drawer might have died before his father, and then these notes would have been of no value: but there is plainly nothing in this objection, for the same may be said of any note payable at a distant time, that the drawer may die worth nothing before the note becomes payable.

We do not think that the averment of the death of the father before the indorsement makes any alteration, because we are of opinion that if the notes were not within the statute *ab initio*, they shall not be made so by any subsequent contingency. But for the reasons aforesaid we are of opinion (and so was the Lord Chief Baron *Parker*) that the plaintiff is entitled to his judgment (c); and therefore the rule for arresting the judgment must be discharged (d)."

(a) 1 Str. 24.

(b) *Cunningh. Bills of Exchange* 113.

(c) This judgment was afterwards affirmed in the Court of King's Bench on a writ of error. 2 Str. 1217.

(d) See the following cases, in which the notes or bills of exchange (for they are both on the same footing) were holden not to be good notes or bills, because they were payable out of a particular fund or on a contingency; *Banbury v. Liffett*, 2 Str. 1211; *Dawkes v. Lord Deloraine*, 2 Bl.*Rep.* 782; 3 *Will.* 207; *Roberts v. Peake*, 1 *Burr.* 323; *Kingston v. Long*, M. 25 G. 3. B. R. *Bayley's Bills of Exchange* 71; and *Carlos v. Fancourt*, 5 D. & E. 482.— In these, the notes were holden to be good, because they were payable at all events; *Burchell v. Burchell*, 2 *Lord Raym.* 1545; *Evans v. Underwood*, 1 *Will.* 262; *Poplewell v. Wilson*, 1 *Str.* 264; *Chadwick v. Allen*, *ib.* 706; *Goss v. Nelson*, 1 *Burr.* 226; and *Haussoullier v. Hartfinck*, 7 D. & E. 733.

1742, 3.

H. 16 Geo. 2.
Thursday,
Feb. 10th.JONATHAN SCOTT and FRANCIS RICHARDSON *against*
ROBERT SURMAN SALEM OWEN and JOHN CRUICK-
SHANK, Assignees of RICHARD SCOTT a Bankrupt.

If goods be
consigned to
a factor for
sale, and he
sell and re-
ceive the
money before
his bank-
ruptcy and do
not purchase
with it any
specific thing
capable of
being distin-
guished from
the rest of his
property, the
consignors
cannot re-
cover the
whole money
from his as-
signees, but
must come in
under the
commission.
—So if the
factor at the
time of the
sale agree to
set off a debt
of his own due
to the vendee,
it is the same
as if the factor
received so
much money
from the ven-
dee, and the
consignors
must come in
under the
factor's com-
mission.

—But if the
goods remain
in specie in
the factor's

hands at the time of his bankruptcy, the consignors may recover the goods in trover from the assignees.

—Or if a factor sell goods for his principal, and become bankrupt before payment, and his assignees afterwards receive the money for them, the principal may recover it from them in an action for money had and received.

—So if the factor on such a sale take notes in payment from the vendee payable to him at a future day, and his assignees afterwards receive the money due on the notes, the principal may recover it from the assignees in an action for money had and received.

—If the assignees of a factor (bankrupt) receive bounty money on any article under an act of parliament giving the bounty to the importer, the consignor of that article may recover such bounty-money from them in an action for money had and received.

THE opinion of the Court was delivered, as follows, by

Willes, Lord Chief Justice. "Action on the case for money had and received. The plaintiffs being partners beyond sea consigned a quantity of tar to *Richard Scott* the bankrupt, brother of the plaintiff *Scott*, as their factor. There had been mutual dealings between the two brothers, which were then unsettled. The ship and goods arrived in the *Thames* from *Carolina* 22d *March* 1739. The factor received the bill of lading, and sold the tar on the 28th of *March* following to *Cornelius* and *Jeremiah Owen*; and it was agreed that the tar should be paid for in promissory notes payable four months after the delivery of the goods, and that a debt of 31 *l.* due from the factor to the vendees on his own account should be deducted. 1st *April* 1740 the vendees gave the factor in part two promissory notes, one for 66 *l.* 13 *s.* 4 *d.*; the other for 102 *l.* 6 *s.* 8 *d.*, which with the 31 *l.* made up 200 *l.* On the 3d of *April* 1740 the factor committed an act of bankruptcy, and a commission issued on the 5th on the petition of one of the defendants. The bankrupt delivered up the two notes to them as assignees, and they have since received the money. They have likewise confirmed the sale, and settled the account with the vendees, and received the balance, being 378 *l.* 4 *s.* They have likewise received the bounty-money allowed by act of parliament to the importers, being 299 *l.* 8 *s.*

The defendants insist that as assignees they are entitled to all the money which they have received, and that the plaintiffs must come in as creditors under the commission.

The plaintiffs insist that, the bankrupt being only a factor, the money received on the notes, though payable to the bankrupt or his order, and likewise the money received of the vendees, and also the bounty-money, must be considered as money received to the use of the plaintiffs. The defendants paid the freight duty and other charges, which with the commission amounted to 519*l.* 2*s.*

1742, 3.

SCOTT
against
SURMAN.

The case was tried before me at *Guildhall* 27th of June 1741; and the question reserved (a) for the opinion of the Court was whether the plaintiffs are entitled to the 358*l.* 10*s.* for which the verdict was given, or to any and what part thereof. The sum of 358*l.* 10*s.* arises from deducting the 519*l.* 2*s.* out of 877*l.* 12*s.*, which was the whole produce of the tar. We did not consult my Brother *Fortescue A.*, he not being in Court at the time of the argument: but Lord Chief Baron *Parker* agreed in opinion with us, and has given me authority to say so, that the verdict ought to be for the plaintiffs for 327*l.* 10*s.* deducting the 31*l.*, for which we are all of opinion that the plaintiffs can only come in as creditors, it standing just on the same foot as if the bankrupt had received it in money before his bankruptcy.

We are not quite agreed in our reasons, though we all agree that the verdict shall be for the plaintiffs for 327*l.* 10*s.*; and therefore I will inform you in what we all agree, and in what there is some little difference between us.

There are three things in dispute;

1st, The money received on the notes;
2dly, The money received of the vendees as the balance of the account;

And 3dly, The 299*l.* 8*s.* received by the defendants for the bounty-money.

We all agree that the equity of the case is with the plaintiffs; and that therefore if the law were against the plaintiffs they would certainly be relieved in equity. The cases of *Copeman v. Gallant*, 1 *P. Wms.* 314; of *Wiseman v. Vandeput*, 2 *Vern.* 203;

(a) This case was twice argued on the 26th of May and 9th of November 1742 by *Skinner* and *Prime* King's Serjts. for the plaintiffs and by *Willes* King's Serjt. and *Eyre* Serjt. for the defendants.

1742, 3.

SCOTT
against
SURMAN.

of *Burdett v. Willett* in the same book 638; and of *Whitecomb v. Jacob*, 1 Salk. 161, are all clear and plain to this purpose. This point therefore cannot be disputed. And wherever the equity of the case is clearly with the plaintiff, I will always endeavour if I can, and if it be any ways consistent with the rules of law, to give him relief at law. And I found my resolution on a maxim in law, that the law will always avoid circuitry of action if possible, to prevent trouble and expence to the suitors; and for the same reason I think à fortiori we ought to endeavour, if possible, to prevent suits in Courts of Equity. But to be sure no motive whatever is sufficient to warrant our determining contrary to law.

I will therefore in the next place consider what the law is. And there is a notion, I own, which weighs much with me to be of opinion with the plaintiffs, of which my Brothers are doubtful; and therefore as I believe it was never started before, I shall only just mention it and shall not rely upon it. My motion is that assignees under a commission of bankrupt are not to be considered as general assignees of all the real and personal estate of which the bankrupt was seised and possessed, as heirs and executors are of the estates of their ancestors and testators; but that nothing vests in these assignees even at law but such real and personal estate of the bankrupt in which he had the equitable as well as the legal interest, and which is to be applied for the payment of the bankrupt's debts (a). And I found this my opinion both on the reason and justice of the case, and likewise on the several statutes made concerning bankrupts which relate to this point. As to the reason of the case, I rely here again upon the rule concerning circuitry of action. For I think it would be very absurd to say that any thing shall vest in the assignees for no other purpose but in order that there may be a bill in equity brought against them by which they will be obliged to refund and account, and according to the case of *Burdett v. Willett* will likewise have costs decreed against them, and so the effects of the bankrupt which ought to be applied to the discharge of his debts will be wasted to serve no purpose

(a) And it has been so ruled in several cases. Ex parte *Marsh*, 1 Atk. 159; Ex parte *Butler*, ib. 213; *Clopham v. Gallant*; 1 Com. Dig. 533; *Howard v. Jennet*, 3 Burr. 1369; *Winch v. Keeley*, 1 D. & E. 619; *Webster v. Scales*, M. 25 Geo. 3. B. R. cited, ib. 622; and in *Farr v. Newman*, 4 E. & E. 629, per *Grose J.* whatever.

whatever. If therefore the bankrupt were seised of a trust estate in lands, for the reasons already mentioned I should think that it did not vest in the assignees at all, but that the legal estate as to that should still remain in the bankrupt for the benefit of the cestui que trust. And as this notion is most consistent with reason and justice, so I think it is most agreeable to the statute 13 Eliz. c. 7., to which all the rest refer; for that is the statute which directs what real and personal estate of the bankrupt the commissioners have a power to apply towards the discharge of the bankrupt's debts, and nothing is vested in the assignees by any of the subsequent statutes but what the commissioners had a power so to dispose of. The words (a) of the statute of the 13 Eliz. are "the commissioners shall have power and authority to sell and dispose of such lands which the bankrupt had in his own right, and for such use and interest right or title as such bankrupt had in the same, and his or her money goods chattels wares merchandizes and debts." But as I believe the contrary notion has obtained, and as this is only my own private notion, and my Brothers do not seem to be quite satisfied with it, and as we can determine the present case upon other points in which we are all agreed, I shall not at all rely upon this, but leave it to be considered better and more fully another time, if it should ever come to be the only point on which a case must be determined.

1742, 3.

SCOTT
against
SURMAN.

We are all agreed that if the money for which the tar had been sold had been all paid to the bankrupt before his bank-

(a) The words of that statute are these, The commissioners shall have full power and authority to take by their discretions such order and direction with the body of such person &c, "as also with all his or her lands tenements hereditaments, as well copy or customary hold as freehold, which he or she shall have in his or her own right before he or she became bankrupt, and also with all such lands tenements and hereditaments as such person shall have purchased for money or other recompence jointly with his wife children or child to the only use of such offender, or of or for such use interest right or title as such offender then shall have in the same which he or she

may lawfully depart withal, or with any person or persons of trust to any secret use of such offender, and also with his or her money goods chattels wares merchandizes and debts wheresoever they may be found; and by deed inrolled &c to make sale of the said lands &c." And by stat. 1 Jac. 1. c. 15. s. 13. the commissioners "have power to grant and assign or otherwise to order or dispose of all or any of the debts due or to be due to or for the benefit of the said bankrupt by what person or persons soever, or in what manner and form soever, to the use of the creditors of the said bankrupt" &c.

ruptcy,

1742, 3.

SCOTT
against
SURMAN.

ruptcy, and had not been laid out again by him in any specific thing to distinguish it from the rest of his estate, in that case the plaintiffs could not have recovered any thing in this action, but must have come in as creditors under the commission, as is laid down in the case of *Whitecomb v. Jacob*, 1 *Salk.* 161., and in many other cases. But the reason of this is so very plain that I need not cite any other, because money has no earmark and therefore cannot be followed.

We are likewise all agreed that if the goods had remained in specie unfold in the bankrupt's hands at the time of the bankruptcy, the plaintiffs might have recovered them in an action of trover, and that they could not be applied to pay the bankrupt's debts, according to the case of *L'Apstre v. Le Plaistrier*, cited in 1 *P. Wms.* 318, adjudged in *B. R. M.* 1708. The case indeed of *Wiseman v. Vandeput*, 2 *Vern.* 203. seems to imply the contrary: but it does not appear by that case whether the goods were consigned to the bankrupt, as the buyer or only as a factor; and besides the case of *L'Apstre* and *Le Plaistrier*, which is long since, has determined the contrary. But the present case is a middle case between these two which I have mentioned, but I think may be determined on the same reasons. For why are goods considered still as the owners? because they remain in specie, and so may be distinguished from the rest of the bankrupt's estate. But as money has no earmark, it cannot be distinguished. Otherwise to be sure in reason the thing produced ought to follow the nature of the thing out of which it is produced, if it can be distinguished; and so long as it remains a debt, it is equally distinguishable; or if it be laid out in a particular thing, as the case in *Salkeld* is. And the notes are within the same reason. And we do not only found ourselves on the reason of the thing but on several cases which have been adjudged.

The general rule is that if a man receive money which ought to be paid to another or to apply to a particular purpose to which he does not apply it, this action will lie as for money had and received &c. So held in *Owen* 86, that if money be delivered by A. to one to buy a horse or any other thing, if he do

do not lay out the money accordingly, an action of debt will lie or an action on the case for so much money had and received to *A.*'s use. So in 1 *Salk.* 9. *Poulter v. Cornwall*, if a man receive money for a special purpose, and neglect or refuse to apply it to the uses for which he received it, an action on the case will lie as for money had and received. And though a bill in equity may be proper in several of these cases, yet an action at law will lie likewise; as if I pay money to another to lay out in the purchase of a particular estate or any other thing, I may either bring a bill against him considering him as a trustee, and praying that he may lay out the money in that specific thing, or I may bring an action against him as for so much money had and received for my use. Courts of Equity always retain such bills when they are brought under a notion of a trust, and therefore in this very case have often given relief where the party might have had his remedy at law, if he had thought proper to proceed that way.

1742, 3.

SCOTT
against
SURMAN.

To apply this general rule to the present case. The assignees having received this money which belongs to the plaintiffs and ought not to be applied to pay the bankrupt's debts, they ought to have paid it to the plaintiffs, and not having done so, this action will lie against them for so much money had and received to the use of the plaintiffs. But I need not rely on the general rule only, for this very point now in question has been twice solemnly determined. First, in the case of *Gurratt v. Cullum* (a), *T. 9 Anne, B. R.* which was thus. The plaintiff being in *Ireland* employed *Burtwell* and *Mason* as his factors in *London* to sell goods for him, which he had sent to them. They sell a parcel to *J. S.* for 20*l.* the plaintiff not knowing to whom they were sold, nor *J. S.* whose goods they were; but they were delivered to him as the goods of *B.* and *M.* by a bill of parcels and charged to their account in their books mutually. *B.* and *M.* before payment became bankrupts, and their debts are assigned by the commissioners to the defendant, who afterwards receives the 20*l.* of *J. S.* The plaintiff brought an action for money had and received to his use; and this matter being referred by *Holt* for the opinion of the King's Bench, judgment was given on

(a) *Bull. N. P.* 42. last ed. by the name of *Garrat v. Cullum*.

1742, 3.

SCOTT
against
SURMAN.

argument for the plaintiff. Afterwards at *Guildhall* before Lord Chief Justice *Parker*, this case was cited and allowed to be law, because though it was agreed that payment by *J. S.* to *Burtwell* and *Mason* with whom the contract was made would be a discharge to *J. S.* against the principal, yet the debt was not in law due to them, but to the person whose goods they were, and therefore it was not assigned to the defendant by a general assignment of their debts, but remained due to the plaintiff as before; and being paid to the defendant who had no right to have it, it must be considered in law as paid for the use of him to whom it was due, and so an action will lie as for money had and received to his use.

There were, I think, but two objections of weight made on the other side. First, That the notes being given to the factor must be sued for in his name, and had discharged the former debt. But this is otherwise; for the plaintiffs were not obliged to accept such notes, neither do they discharge the former debt either in respect to the plaintiffs or the factor. They do not discharge the former debt, because they only create a debt of an equal nature: but it would have been otherwise if a bond had been given; and so it was held in the case of *Cumber v. Wane* (a), *P. 7 G. 1. B. R.* where a note given in discharge of a debt for goods sold and delivered was pleaded to an action brought (not on the note but) for the goods sold, and held to be no good plea being of the same nature as the first debt: but if a bond had been given, held it would have been a discharge; and this judgment is founded on several former resolutions. If indeed these notes had been actually negotiated, it might have been otherwise, because then it must have been considered as if the money had been received; besides innocent persons might be prejudiced: but that is not the present case.

The other objection was that a factor by virtue of a general authority cannot sell on credit: if he do, it is at his own risk, and the owner is not obliged to accept the vendee as his debtor; and that it does not in the present case appear that he had any special authority. And for this purpose several passages were cited out of the civil law books of the nature of a factor. To

(a) 1 *Str.* 426.

this I shall give two answers; 1st, that the nature of dealing is now quite altered, of which Courts of Law must take notice; for constant and daily experience shews that factors do sell upon credit without such a special authority. If it were otherwise, it would be the greatest prejudice to trade, as it would be likewise if this notion should prevail that the owner must suffer by the factor's becoming bankrupt; and we ought always as much as we can and as far as is consistent with the rules of law to do every thing to promote the trade and commerce of the nation. Another answer likewise may be given that a man may in many cases either consider another as a wrong-doer or as a receiver of money for his use as he thinks best and most for his advantage; and therefore if the nature of a factor were as is alleged, yet even in that case the owner may come either against the vendee or the factor at his election; and the plaintiffs by this action have chosen to confirm the sale.

1742, 3.

SCOTT
against
SURMAN.

And therefore as we think that there is nothing in these objections, upon the reason of the thing, the general rule which has always prevailed in parallel cases, and these two cases in point, we are clearly of opinion for the plaintiffs as to the two first sums: and as to the last we think that it is still much stronger for them; for as the bounty-money does not belong to the plaintiffs or become due to them by virtue of any contract made by the factor, but as it is given by several acts of parliament *to the importer (a)*, whoever received this certainly received it for the use of the plaintiffs, who were the owners and importers of the goods.

We are therefore of opinion that the judgment ought to be for the plaintiffs for 327 *l.* 10 *s.*, and ordered the verdict and judgment to be entered up according to the rule for that sum (b)."

(a) Vid. stat. 3 & 4 An. c. 10.
and 2 H. Bl. Rep. 501.

(b) Vid. *Tooke v. Hollingworth*, 5 D. & E. 215.

1743.

E. 16 G. 2.
Wednesday,
April 27th.

WILLIAM DAWES Assignee of DINGLEY ASKHAM
Sheriff of the County of HUNTINGDON against
WILLIAM PAPWORTH Esq.

It is sufficient for the assignee of a bail-bond to state in his declaration that the sheriff assigned the bond to him according to the form of the statute, without adding "that the assignment was under the hand and seal of the sheriff;" for under that general allegation he must prove that it was under hand and seal &c. To such a declaration the defendant may plead that the sheriff did not assign &c according to the form of the statute, and the plaintiff may traverse the plea in those words.

"DEBT on a bail-bond given to the sheriff 10th of June 1742 in the sum of 263*l.* 6*s.* 8*d.* It was agreed that every thing previous to the assignment is rightly set forth in the declaration; and then it goes on and says, that the said *Dingley Askham* on the 29th of June 1742 by a certain indorsement upon the bond assigned and set over the same to the plaintiff according to the form of the statute in that case made and provided, by force whereof &c.

The defendant pleads that *D. Askham* did not assign the said bond to the plaintiff according to the form of the statute in that case made and provided &c; and the plaintiff tenders an issue thereupon.

The defendant demurs, and shews for cause of demurrer, that the replication puts both matter of law and matter of fact in issue to be tried by a jury, to wit, the matter of fact of the writing obligatory being assigned, and the matter of law, the legality of its being assigned according to the statute.

The plaintiff joins in demurrer; and upon this demurrer it comes now in judgment before the Court.

Agar for the defendant took two objections; 1st, to the declaration, that the plaintiff had not set forth that the assignment was *under the hand and seal (a) of the sheriff*, as it was expressly directed to be by the stat. 4 & 5 *An. c.* 16. *f.* 20. (b); and that

(a) In truth it was stated on the record to be *under the seal* of the sheriff; "he the said *D. Askham* sheriff of the county of *Huntingdon* aforesaid afterwards, to wit, on the 29th day of *June* in the year of our Lord 1742 at *Cambridge* aforesaid at the special instance and request of the said *William Dawes* plaintiff in this suit by a certain indorsement upon that writing obligatory which the said *William Dawes*, (sealed with the seal of the said *D. Askham* in the presence of two credible witnesses to wit &c) brings here into court, bearing

date &c by the name of *D. Askham* sheriff of the said county of *Huntingdon* assigned and set over unto the said *William Dawes* &c."

(b) Which enacts that "the sheriff or other officer at the request and costs of the plaintiff in such action, or his attorney shall assign to the plaintiff in such action the bail-bond or other security taken from such bail, by indorsing the same and attesting it under his hand and seal in the presence of two or more credible witnesses &c.

therefore

therefore the plaintiff had not set forth enough to support his action; and he compared it to an award, which if it were to be under the hand and seal of the arbitrators was not good if only under their seal, for which purpose he cited *Cro. Jac.* 277. *Sallows v. Girling*; and 2 *Mod.* 77. *Columbel v. Columbel*. He also compared it to a power of revocation, which if it were to be by deed under the hand of the party, or to be executed in the presence of two witnesses, if it be not under the hand of the party or not executed in the presence of two witnesses is void; and for this purpose he cited *Palm.* 109; and 112; 1 *Bulstr.* 110; *Scott v. Scott*, 1 *Lutw.* 338. The second objection was to the issue, that matter of law and matter of fact were both put in issue, which he insisted was wrong; and for that purpose cited *Hob.* 104.

1743.
DAWES
against
PAPWORTH.

Draper for the plaintiff insisted that saying that the assignment was *secundum formam statuti* was well enough, and that this was the constant form. He said likewise that there was a great deal of difference between a bare or nude authority and an authority coupled with an interest; and that the cases cited were only in respect to the execution of powers or authorities which were not coupled with interests.

But I think this no answer to the objection; for all the essential circumstances must be observed in the execution even of authorities coupled with interests.

But we were all of opinion (Brother *Fortescue A.* present in court) that there was no weight in either of these objections.

As to the first, we thought this the best way of declaring, though declarations sometimes are otherwise, because the plaintiff must prove, to shew that the assignment was according to the statute (a), that it was under the hand and seal of the sheriff; and therefore the cases which were cited upon this point, though all admitted to be law, are not at all parallel, since the plaintiff

(a) The same point has been ruled on another part of this clause in the act. Though the statute requires the indorsement to be made by the sheriff in the presence of two witnesses, it is not necessary to set out their names in the declaration stating the assignment, or even to state that it was indorsed in the presence of two witnesses. *Robinson v. Taylor*, *Fort.* 366;

Lease v. Box, 1 *Wils.* 121; *Rollison v. Taylor*, *Tr.* 13 *Geo.* 1. *ib.* 122. It is sufficient to state generally that the sheriff at the request and costs of the plaintiff assigned the bond to the plaintiff according to the form of the statute. *Mifflin v. Sir W. Morgan*, 2 *Lord Raym.* 1564. Indeed in *Neat v. Mills*, *Fortesc.* 371., where it was alleged in the declaration

1743

DAWES
against
PARWORTH.

in this case cannot recover unless he produce in evidence an assignment *under the hand and seal of the sheriff.*

As to the second objection, we denied the rule; for there is no such rule that matter of law as well as matter of fact may not be put in issue if complicated with the matter of fact; for matter of law is put in issue in most issues. It may come in question upon non est factum; non dimisit; devisavit vel non; feoffavit vel non; nay even upon non assumpsit, since infancy may be given in evidence on that issue. But the rule is that a mere matter of law, or a consequence of law, cannot be put in issue by itself. If it were otherwise, it would be very hard to give judgment against the plaintiff in the present case, because he has only traversed literally the defendant's plea; so if the issue were wrong, the first fault was in the defendant.

So judgment (a) was given for the plaintiff *per Curiam.*"

that the bail-bond was assigned in the presence of *one witness, W. J. Weaver*, it was holden ill: but there, according to the plaintiff's own shewing, the bail-bond was not

assigned according to the form of the statute.

(a) A writ of error was brought in this case, and was nonprossed. See *Tr. 16 & 17 Geo. 2. Rol. 785. B. R.*

RAYNER against POINTER.

E. 16 G. 2.
Wednesday,
April 27th.

Though a plaintiff or defendant pray a wrong judgment, the Court must give such judgment as the party is entitled to. And therefore if the defendant, in a demurrer to a declaration, pray judgment of the declaration and that it may be quashed, and the plaintiff join in demurrer, and the declaration be good, the Court will give judgment in chief in favour of the plaintiff.

"THE plaintiff declared in debt; and there were several counts. The defendant demurs generally to the declaration in this manner;

And the defendant prays judgment of the declaration *aforsaid*, because he says that the said declaration and the matter therein contained are insufficient in law for the said Henry to have or maintain his action against the said John, and that he is not under any necessity nor bound by the law of the land to make any answer to the said declaration, and this he is ready to verify; whereupon for default of a sufficient declaration in this respect the said J. Pointer prays judgment of the declaration *aforsaid* and that the same may be quashed &c.

The plaintiff joins in demurrer; and on this demurrer it came before the Court.

Prime for the plaintiff. No one for the defendant.

I conceived a doubt at first whether we could give judgment in chief, the demurrer only praying judgment of the declaration both at the beginning and the end. And therefore at first I only gave judgment nisi, that I might consider of it: but upon consideration and talking with my Brothers we made the rule absolute on the 29th. For though it might be otherwise in the case of a plea framed in this manner (concerning which as yet I have no settled opinion), on a demurrer thus worded judgment must be in chief, because there is no such thing as a demurrer in abatement. If therefore it be considered as a demurrer in abatement, it is void, and so the plaintiff for want of an answer on the part of the defendant is entitled to a judgment in chief: if it be considered as a proper demurrer, he is entitled to the same judgment (a). And though a plaintiff pray a wrong judgment, the Court must give such judgment as he is entitled to by law (b).

1743.
RAYNER
against
POINTER.

Vid. 2 Saund. 361, *Sacheverell v. Froggatt*, ib. 150. Ib. 374, *Pinckney v. The Inhabitants of East Hundred in Rutland*, where the demurrers are exactly in this form and judgment is given in chief. See also The case of *Dominique v. Davenant*, 1 Salk. 220; 6 Mod. 198. (c)."

(a) See also *R. v. Sir Oliver Butler*, 3 Lev. 322, 3; and *Leaves v. Bernard*, 3 Mod. 132.

(b) See *Campbell v. French*, in error, 6 D. & E. 200, and the cases there

cited; and *Addison v. Overend*, 6 D. & E. 766.

(c) And *Bullythorpe v. Turner*, E. 17 Geo. 2. post.

PADFIELD against CABELL and Others.

TO an action of trover for taking the plaintiff's goods the defendants pleaded the general issue, and at the trial at Wells in Somersetshire before Mr. Baron Abney a special case was reserved for the opinion of this Court.

The defendants, constables, seized the goods in question by virtue of a warrant signed by two justices of the peace, in which it was recited that the plaintiff had been convicted before them in the penalty of 100*l.* but which they had mitigated to 10*l.*, for having unlawfully sold and retailed spirituous liquors in less quantities than two gallons without a license, and by which

Trin.
16 & 17 G. 2.
Friday,
June 17th.
A warrant of
distress
granted by
two justices
under stat.
9 G. 2. c. 23,
which refers
to 12 Car. 2.
c. 24. s. 45.
on a conviction
for selling
spirituous
liquors with-
out a license,
need not be
under the seals
of the jus-
tices: it is
sufficient if it
be under their hands. Bull. N. P. 83. S. C.

the

1743.

PADFIELD
against
CABELL.

the defendants were commanded to levy the sum of 10*l.* &c. on the goods of the plaintiff &c: but the warrant was not under seal. The question reserved was whether the warrant, not being under seal, was sufficient to authorize the defendants to seize the goods &c.

The case was argued by *Wynne* Serjt. for the plaintiff, and *Gapper* Serjt. for the defendants; and afterwards the Court delivered their opinion in favour of the defendants.

Willes, Lord Chief Justice (a). This defence arises on the statute 9 *Geo.* 2. c. 23: but as that refers (b) to the stat. 12 *Car.* 2. c. 24. s. 25., it must be determined on that statute. There the words are "to award and issue out warrants under their hands for the levying of such forfeitures, penalties, and fines." Now a *warrant* does not *ex vi termini* imply an instrument under seal; it signifies no more than an *authority*. All the books, in which it is said that a warrant must be under seal, are founded on a case in the Year Books, *H.* 14 *Hen.* 8. fo. 16. a., where it is said that a justice of peace is a judge of record, and hath a seal of office; and that the inferior officer when he sees the seal must give credit thereto (c). Lord *Coke*, in his 2d *Inst.* 52, 591, 592, speaks only of warrants of commitment by judges of record; so does Lord *Hale*, 1 vol. 460. and 577., and he refers to the case in 14 *Hen.* 8. but he adds that some have thought it sufficient if *it be in writing subscribed by the justice*. *Dalton*, p. 401., says the warrant or precept in writing ought to be under their hand and seal, *or under their hand at least*. And he puts two instances of warrants only under hands; one by Lord Chancellor *Ellesmere* for a contempt, *A. D.* 1607; the other by Chief Justice *Popham* in 3 *Jac.* 1. There are also in *Dalton* two precedents of warrants by justices only *under their hands*. The case of *Aylesbury v. Harvey* (d), 3 *Lev.* 205.

is

(a) It does not distinctly appear whether this was the opinion of the whole Court, or only that of the Lord Chief Justice.

(b) Sect. 5.

(c) This point respecting the necessity of a warrant being *under seal* did not arise in the case in 14 *Hen.* 8. 16. a., where the defendant justified, in an action of false imprisonment, under a warrant granted

by a justice of the peace after the arrest, without shewing in his plea *when* or *where* the warrant was granted. The passage here relied upon was merely a dictum of Chief Justice *Brudenell*, who put it by way of illustration in considering in what cases an officer would be justified in executing a warrant though the justice would not in granting it.

(d) In that case the defendant justified seizing

is also strong as to this purpose. A strong argument too arises from the different penning of different acts of parliament; in some of which a warrant is directed to be made under hand *and seal*, whereas the section of the act on which this question arises only speaks of a warrant *under their hands* (a). Of the former kind are 6 Geo. 1. c. 21; another section (b) even in this very act, 12 Car. 2. c. 24. by which a power is given to the commissioners in another instance to be executed by them by writing *under their hands and seals*, which shews that the present is not casus omisus.

Postea to the defendants.

1743.
PADFIELD
against
CABELL.

feizing a cup under a warrant, granted by justices of the peace on a conviction on the excise laws, to levy 20s.; and in answer to an objection taken to the plea that the warrant was not pleaded with a profert, *The Court* said "The statute does not require that the warrant be *under hand and seal*, but only in writing; and no writing is to be so pleaded, except it be a deed &c."—From the pleadings in this case, which are in *Lev. Entr.* 152. it seems probable that that was a conviction

on this very statute 12 Car. 2. c. 24. s. 29 and 30.; and in the plea as there set forth the warrant to levy the penalty of 20s. is *stated to be only under the hands* of the justices.

(a) See also the preceding statute, 12 Car. 2. c. 23., another excise act, where power is given to the commissioners (sect. 31.) "to award and issue out warrants *under their hands* for levying of such forfeitures, penalties, and fines" &c.

(b) Sect. 33.

THOMAS SOLLERS Clerk *against* RICHARD LAWRENCE Clerk and ELIZABETH his Wife.

Trin.
16 & 17 G. 2.
Wednesday,
June 22d.

THE opinion of the Court was delivered, as follows, by

Willes, Lord Chief Justice. "Debt. The plaintiff declares upon the judgment of five of the commissioners, who are made

In an action founded on the judgment of a Court of record of limited jurisdiction,

dition, sufficient must be set forth to shew that they had jurisdiction to give the judgment; and if sufficient be stated for that purpose, it will be intended that they acted right unless the contrary appear upon the record. By stat. 15 Geo. 2. c. 16. for rebuilding Blandford then lately burned down, commissioners were appointed (who were made a court of record) to settle all differences and demands &c between all persons their heirs executors administrators successors or assigns touching the building &c, and authority is given to them to direct any alterations in the foundations of the new houses, by taking or giving ground from one to another, and ordering satisfaction to be made by one to the other &c &c; under this act the Court ordered the sum of 100*l.* to be paid by A. the executor of the late vicar of B. (whose house was burned down in his lifetime) to C. the succeeding vicar; held first that the order was conclusive on A. personally, though it did not appear on the record that A. had received assets to that amount; 2dly, that C. might maintain debt against A. for that sum; and 3dly, that A. could not plead to such action a bond-debt of the testator still unpaid and no assets ultra.

If a parsonage or vicarage-house be destroyed without any default in the incumbent, the Ecclesiastical Court usually orders a fifth part of the profits of the living to be set apart for rebuilding.

1743.
 SOLLERS
 against
 LAWRENCE.

a court of record, and are appointed to hear and determine all differences and disputes touching and concerning the rebuilding of houses and other buildings in the town of *Blandford* burned down or demolished by the late dreadful fire by an act made 5 Geo. 2. c. 16.

The declaration sets forth that a court was holden at the *Crown Inn* in *Blandford Forum* before five of the commissioners (naming them); and that upon reading the petition of the plaintiff *Thomas Sollers*, setting forth that by the late fire the vicarage-house and outhouses belonging to the parish of *Blandford* aforesaid were burned down and not rebuilt in the lifetime of *Thomas Riley* Clerk, who was then vicar and in possession thereof; that the said *Thomas Riley* died in the month of *November* 1736, soon after which his daughter, the defendant *Elizabeth*, then *Elizabeth Morecraft*, possessed herself of all his personal estate, which was very considerable, either as his executrix or administratrix; that since the plaintiff has been instituted and inducted into the said vicarage, which was in the month of *February* in the year 1736, he had applied himself to the defendants *Richard* and *Elizabeth* either to rebuild the said house and outhouses, or make him satisfaction for dilapidations on account of the loss sustained by the said dwelling-house and outhouses being consumed, which amounted to 360 *l.* or thereabouts, but could obtain no reasonable satisfaction; it further set forth that the garden belonging to the said house and the ground whereon the house &c stood had been taken away for public uses by order of that Court, and therefore prayed that the defendants might be compelled by an order or decree of that Court either to rebuild the house and outhouses or make such satisfaction out of the personal estate of the said *T. Riley* deceased to the petitioner for dilapidations as might enable him (with the money already decreed as a dividend of the charities given to that town) to rebuild the said house &c, and that such a reasonable allowance might be made to the petitioner for the ground taken away as the Court should think fit; upon which petition the Court did then order and decree that the defendants should within three months from the time of notice of this order pay or cause to be paid to the plaintiff the sum of 100 *l.*; which

the

the Court did adjudge to be near a fifth part of the value of the vicarage from the time of the fire to the time of the decease of the said *T. Riley*, and which sum when paid the Court did order and decree should be in full satisfaction for dilapidations on account of the said vicarage-house &c being burned down and consumed as aforesaid, and should be applied by the plaintiff towards rebuilding the said house &c; and from and after payment of the said sum of 100 *l.* to the plaintiff the Court did order that the defendants their executors administrators and assigns and their lands tenements goods &c, and the lands tenements goods &c of the said *T. Riley* deceased, should be and they were by the said order discharged and indemnified from all actions and suits for dilapidations on account of the said vicarage-house &c being burned down and consumed as aforesaid; and the said Court did further order that a reasonable satisfaction should be made to the plaintiff for the ground taken away from the said vicarage as aforesaid; as by the said order &c; which said order still remains in full force and effect, not in the least reversed vacated annulled discharged or satisfied; and that the defendants afterwards to wit 12th of *August* 1740 had notice of the said order, yet execution thereof still remains to be done, and the said plaintiff hath not been yet paid or satisfied the said 100 *l.* or any part thereof; whereby an action hath accrued to the said plaintiff to demand and have of the said defendants the said 100 *l.*, yet the said defendants, though often requested, have not nor hath either of them paid to the plaintiff the said 100 *l.* or any part, but refuse to pay the same; to the plaintiff's damage, 20 *l.* &c.

1743.

SOLLERS
against
LAWRENCE.

The defendants, protesting that the said declaration is insufficient in form &c, plead that *T. Riley* in his lifetime, to wit, 8th of *October* 1709 by his writing obligatory became bound to *Robert Eyre* and two others (naming them) in the sum of 1500 *l.* which still remains in force and unsatisfied; and they say that they (the defendants) have fully administered all the goods and chattels of the said *T. Riley* at the time of his death, except goods and chattels to the value of 10 *l.*, and that they have not any goods and chattels which were his at the time of his death in their hands unadministered, nor had any at the time of suing out the writ or at any time since, except the said goods to the value of

1743.

SOLLERS
against
LAWRENCE.

10 l., which are not sufficient to satisfy the said debt due on and by the said writing obligatory, and which are subject and liable to the payment of the same; and this they are ready to verify; and pray judgment &c.

The plaintiff demurs generally; and the defendants join in demurrer; and on this demurrer it comes now in judgment before the Court.

It was agreed (a) that the plea is bad in two respects; 1st, Because a bond debt cannot be pleaded to a judgment; 2dly, Because the defendants are not sued as executors but in their own right.

The question therefore only is whether the declaration be sufficient to support this action, and this depends on these two points;

1st, Whether there is sufficient set forth to shew that the commissioners had a jurisdiction;

2dly, Whether, supposing that they had, they have pursued the directions of the act of parliament which gives them that jurisdiction and have given a right judgment. These two questions must be determined by two very different rules of law.

As to the first, the rule is that nothing must be intended in favor of their jurisdiction, but that it must appear by what is set forth on the record that they had such a jurisdiction (b).

As to the second; the rule is that if they had a jurisdiction, every thing must be intended in favor of their judgment, and that they must be taken to have judged right, unless the contrary appears by any thing that is set forth on the record. And as both these questions will depend on the words of the statute which constitutes this jurisdiction, I will in the first place state the several clauses in the act which are relative to this purpose.

By the first section several persons there named "or any five of them (and the persons who gave this judgment were five of those persons) are made and constituted a court of record summarily to hear and determine all differences *and demands whatsoever which have arisen or may arise* between the proprietors

(a) This case was three times argued.

(b) Vid. *Ladbroke v. James*, sup. 199.
landlords

landlords tenants or late occupiers of any of the houses or buildings burned down or demolished or damaged by reason of the fire, or between any person or persons having or claiming any estate right title or interest in law or equity charge or incumbrance in to or upon the same, or their or any of their heirs executors administrators successors or assigns or any other persons, touching or concerning building *or not building* the said houses buildings or premises, or for or concerning any covenant condition or penalty relating thereto, or any rate or contribution to be borne or paid by any person or persons interested in the premises and all incidents relating thereto." In sect. 4. for the better regulating the new building of the said demolished or damaged houses or buildings, "the said Court shall by the authority of this act have power to order and direct any alterations in the foundations thereof by taking or giving ground from one to another or otherwise as shall in their judgments be expedient for the better rebuilding of the said town, and shall and may appoint what sum of money or other satisfaction shall be paid or made by the person or persons having benefit by such alteration unto the person or persons who shall have any loss thereby, and such persons their heirs executors administrators *successors* and assigns shall for ever hereafter hold and enjoy what shall be so ordered and directed by the said Court." In sect. 7. "In case the proprietors or owners of the houses demolished or damaged by the fire their heirs executors administrators successors or assigns shall not within four years from the 25th of *March* 1732 lay the foundation of their houses or buildings to be rebuilt, and shall not within the time to be limited by the said Court rebuild and finish the same, upon such default the said Court shall have power and authority by their order and decree to dispose of the ground so unbuilt and of all courts &c thereunto to such person or persons their heirs executors administrators *successors* and assigns as will rebuild the same according to the respective interests of the persons so neglecting or refusing to rebuild the same, and shall and may appoint what sum of money or other satisfaction shall be made or given to the person or persons so making default as aforesaid, and the soil &c so disposed of to the undertaker to rebuild shall for ever hereafter remain unto the rebuilder his heirs executors administrators and

1743.

SOLLERS
against
LAWRENCE.

1743.

SOLLERS
against
LAWRENCE.

assigns in such manner as the Court shall have ordered the same."

It is plain that by the words of this act a very extensive jurisdiction is given to the commissioners; for they may determine disputes between all persons whomsoever which have arisen *or may arise* touching the repairing building *or not building* any houses or buildings in *Blandford* burned down or damaged by the late fire, and touching any rate or contribution to be borne or paid towards the rebuilding of the same; and by the seventh section in case of default of the owner to rebuild, they may take away the ground from him, and give it to another, making him a proper satisfaction, and by the fourth section, though he be guilty of no default at all.

Now the present dispute was certainly concerning a house in *Blandford*; a house burned down by fire; and concerning the building or not building of the same. They seem therefore plainly to have a jurisdiction.

The only objections were,

1st, That this dispute did not subsist at the time of the act of parliament;

2dly, That the commissioners could not in this case order the executors to pay money for rebuilding the vicarage-house, when the ground on which it was to be rebuilt was taken away.

As to the first: the dispute, in order to give them a jurisdiction, need not subsist at the time of the act; for the words are "which have arisen *or may arise*." Nor need the parties be in being at that time; because the words "heirs executors administrators *successors* and assigns" are in every one of those clauses in the act which give them a jurisdiction. There is nothing therefore in this objection.

The second seems rather to be an objection to the judgment, and more proper to be made use of on that head. But supposing it to be an objection to the jurisdiction, it receives this plain answer, that the petitioner prays money for rebuilding, that the money decreed is ordered by the Court to be laid out
in

in rebuilding, and that the Ecclesiastical Court would oblige them to do it; and as the ground is taken away by the decree of the Court, it must be intended that they have pursued the statute and done right, and have either given the vicar a new piece of ground or satisfaction in money which is the same thing; for if they have, he must lay it out in the purchase of a piece of ground for that purpose. Besides it does not appear by the record whether the ground was taken away in the lifetime of the late vicar or not. If it were not, there is an end of the objection. If it were, it will amount to the same thing; for either it was taken away by virtue of the fourth or seventh section; if by virtue of the seventh, it was by his default in not rebuilding the house, and to be sure neither he or his representatives shall be allowed to take advantage of his default. If it were taken away by virtue of the fourth clause, it will come to just the same; for if *Riley* had been sued, he could not have said "I cannot rebuild because the ground is taken away;" for the plain answer would have been, "he may have more ground for asking, or money to buy ground, the commissioners must give it to him by virtue of the same clause which authorised them to take it away." If therefore he will not ask for it, it is his own default, and no one can take an advantage of his own neglect or laches. We think it therefore very clear that the commissioners had a jurisdiction. And if they had, it will not be very difficult to support the judgment, since we cannot adjudge it to be bad unless any thing appears on the face of it to shew that it is so.

As to the objections to the form of the proceedings, as that it does not appear that the parties were summoned and had an opportunity to make a defence, and some other objections of this sort; this being a court of record, it is a known rule that these things need not be set forth, but it shall be intended that the Court proceeded regularly where the contrary does not appear.

As to the merits; the only objections are,

1st, That this house being burned in the general conflagration, and it not being pretended that *Riley* was in any default, therefore he was not obliged to contribute any thing to rebuild the house, and consequently his representatives could not be obliged;
for

1743.

SOLLERS
against
LAWRENCE.

1743.

SOLLERS
against
LAWRENCE.

for as they stand only in his place they cannot be liable farther than he was.

2dly, It was said that if he were obliged, no suit could be brought against his executors or administrators, for that actio personalis (as this is) moritur cum personâ.

3dly, It was objected that there was no foundation for the rule and measure of damages, which the commissioners plainly went by, to give the fifth part of the profits during the life of *Riley*.

These being questions properly belonging to the Ecclesiastical Courts, and the books which were cited being very dark in relation to these matters, it was thought proper to hear civilians, and from the best lights that we could get from them the objections seem to be of no weight. To be sure if *Riley* were not liable, his executors or administrators were not.

It is proper therefore to consider in the first place whether he was liable. It is certain that if a parsonage or vicarage-house be burned down, there must be some way of rebuilding it for necessity's sake and the good of the public; for there must be parsons and vicars, and they must have houses to live in; it follows therefore that when they are burned down they must be built up again. If the suit be brought *ex officio* in the lifetime of the incumbent, (and it must be so because no one is interested to bring it,) Dr. *Paul* informed us that the constant rule is to order a fifth part of the profits of the living to be set apart in order to rebuild the house. This must plainly be for necessity's sake and when the incumbent is in no default: for if he be in fault, he ought (as in the general case of dilapidations) to pay the whole. Several cases were cited by Dr. *Paul* to this purpose; the case of the Deanry-house and the Chancellor's house at *Chichester*, and the case of the vicarage-house of *Worminghall* in *Berkshire*; which though not cases directly in point yet plainly shewed that the Ecclesiastical Courts usually went by this rule, and they founded their determinations on the injunctions of *Ed. VI.* and *Queen Elizabeth*, and an injunction of Archbishop *Cranmer*, enforcing the same and ordering them to be observed; which though perhaps not strictly law were very proper measures for the Ecclesiastical Courts to govern themselves by, when they otherwise must judge arbitrarily and without any rule

rule at all. As therefore the commissioners were under a necessity of giving some damages, as this is a very equitable rule, as it is observed in the ecclesiastical courts and founded on the authorities before mentioned, and as the common law is quite silent in relation to this matter, I do not see what better rule the commissioners could govern themselves by. Therefore the first and third objections seem to be of no weight.

As to the second, that the action will not lie against the executors though there might be a remedy against *Riley*, it is contrary to all the rules laid down concerning dilapidations and the constant practice in relation to suits of this sort; for both in the ecclesiastical and temporal courts, since these suits have been retained here (a), multitudes of suits, nay most of them, have been against the executors or administrators, and have been always holden to be good, because it is not considered as a tort in the testator, but as a duty which he ought to have performed, and therefore his representatives, so far as he left assets, shall be equally liable as himself. And for this reason, it is not contrary to the rule that *actio personalis* (which is always understood of a tort) *moritur cum persona*; as actions on the case for all sorts of debts and duties are now daily brought against executors, though this was formerly doubted. But the law has been now so settled at least 150 years (b).

We think therefore that the commissioners had a jurisdiction; and as nothing appears upon the record to shew that they have determined wrong, we must intend that it appeared before them that the testator left assets, otherwise that they would not have made a personal decree against the defendants; and therefore we are of opinion that judgment must be for the plaintiff."

—N. I and my Brother *Burnett* only were present in court at the time of giving this opinion; my Brothers *Fortescue A.* and

(a) It was formerly doubted whether any action could be brought in the common law courts for dilapidations: but that point has been considered as settled ever since the case of *Jones v. Hill*, 3 *Lev.* 268. And such an action may be maintained by a prebendary, as well as by a parson or vicar, against his predecessor. *Radcliffe v. D'Oyley*, 2 *D. & E.* 630.

(b) See *Hambly v. Trott*, *Cowp.* 371, where it was holden that trover does not lie against an executor for a conversion by his testator; and in which case Lord *Mansfield*, after examining all the authorities, stated the result of his inquiries, by distinguishing between those causes of action that do, and those that do not, survive against the executor.

1743.
SOLLERS
against
LAWRENCE.

1743.

SOLLERS
against
LAWRENCE.

Abney not having heard the arguments: but Lord Chief Baron *Parker*, who heard the arguments and consulted with us, gave me authority to say that he was of the same opinion."

M. 17 Geo. 2.
Thursday,
Oct. 27th.

SAMUEL MEAD Esq. against LUKE ROBINSON Esq.

A person who gives a bribe to another to vote at an election for members of parliament is a competent witness to prove the bribery in an action for the penalty under the statute

2 G. 2. c. 24.

—A copy of the poll taken at a borough election, examined with the original, and signed by the returning officer, is admissible evidence in an action for bribery.

—The original precept from the sheriff to the returning officer of a borough, to proceed to an election, is admissible in evidence to prove the allegation in a declaration that such a precept issued &c.

"SKINNER moved on behalf of the defendant, for a new trial upon the misdirection of the Judge, and on the ground that the verdict was contrary to evidence. It was an action of debt for 4000*l.* on the 2 Geo. 2. c. 24. s. 7.; and there were eight counts in the declaration; 500*l.* each. The verdict was for the plaintiff on the third count for 500*l.*; and for the defendant on the seven others.

The defendant in the third count was charged with corrupting one *John Billany* on the 1st of May 14 Geo. 2., *Billany* having at that time and at the time of the election a right to vote in the said election, to give his vote for the defendant and *Francis Chute* Esq. at the election of members of parliament for the borough of *Heydon* in *Yorkshire*, by giving him ten guineas in money as a gift or reward for his the said *Billany* giving his vote as aforesaid in the said election, contrary to the statute &c; and that the said *Billany* by reason thereof did give his vote for them at the said election, whereby &c.

The seventh count was similar to the third, except that it charged the defendant with bribing *Billany* by his agent *P. Ward*.

The objections were, First, that Mr. Serjt. *Birch*, who tried the cause, permitted the plaintiff to give in evidence several particular instances of other persons being bribed by the defendant not named in any of the counts in the declaration (a).

(a) But this is the account of that part of the evidence given by Mr. Serjt. *Birch*, who tried the cause; "In the course of this evidence some few burgesses were named who had received money on their notes either from *Ward*, or from *Moore* or *Fairbridge* as under-agents to him; and

this arose in some measure on the cross examination, on the witnesses being asked by the defendant's counsel whether they would take upon them to name any one burgess who had money lent to him by *Ward*, *Moore*, or *Fairbridge*."

Secondly,

Secondly, That he permitted a copy of the poll to be given in evidence, though *Fowle* the Mayor had the original there, who was served with a subpoena and a duces tecum by the plaintiff, and was ready to have given his evidence and to have produced the poll (a).

Thirdly, That he admitted *P. Ward* to be a witness, though he was particeps criminis, and so swore to excuse himself.

Fourthly, That he admitted *Billany* himself, though liable to the same objection.

Fifthly, That the evidence did not support the verdict on the third count; it being only proved by *Ward* that he lent several persons ten guineas a-piece and *Billany* among the rest, and took their notes for the money, but mentioned nothing of the election nor for whom they were to vote; that it was not the money of the defendant, nor did he know of it till the *Michaelmas* after the election, which was on the 6th of *May* 1741, when in an account between them the notes were delivered to and accepted by him as money; and it being proved by *Billany* that he wanted about that time to pay 18*l.* in town and borrowed ten guineas of one *Fr. Moore* (b) to whom he gave a note payable to the said *Fr. Moore* or order, and that there was not a word mentioned of the election (c); and that he apprehended he should

1743.
MEAD
against
ROBINSON.

(a) Nor was this correctly stated by the defendant's counsel. Mr. Serjt. *Birch*'s report on this head was as follows: "Mr. *Waterland* the town-clerk was called to give some account of the election without producing any poll: but this being objected to, the plaintiff's counsel offered a poll in evidence which was taken by Mr. *Dawson* by the town-clerk's order; but this not being signed by the Mayor, or taken by his direction, I apprehend it ought not to be read. Mr. *Coulthurst* thereupon produced a paper by him called a copy, taken from the original poll: he said he saw the original at the defendant's house under the Mayor's hand; that the defendant himself at his own house in the Mayor's presence examined the produced copy with the original twice over, the witness assisting him therein, which copy was then signed by the Mayor, that it might be produced in the House of Commons; that when he came away the original was in the hands of the defendant, who said it might be wanted in the house;

and that he had not seen it since. Mr. *Coulthurst* proved a notice to the defendant to produce the original poll. Mr. *Roberts* proved a notice to the Mayor to produce it; and on his appearing, the plaintiff's counsel bid him put in the original poll, but he said that he would not, and was not bound to produce it; and so was not sworn. The defendant's counsel objected to the reading of this copy: but I was of opinion on *Coulthurst*'s evidence it might be read, it seeming to me to be a duplicate and of equal authority with the original."

(b) An under-agent of *Ward*.

(c) But according to Mr. Serjt. *Birch*'s report, the evidence of *Ward* and of one *Cannel* was strong to shew that *Billany*, as well as the other voters, took the ten guineas as a bribe, and that the note was only given as a colour to the transaction; according to the evidence of *Cannel*, "The notes the burgesses had given were to be burned the day after the election."

1743.
MEAD
against
ROBINSON.

be called upon for the money; and that therefore as the third count is a personal charge on the defendant, there was no foundation on this evidence to find a verdict against him on that count."

—A special case was reserved on another point made at the trial, and a motion was also made by *Draper* Serjt. in arrest of judgment.

The motion for a new trial came on to be argued on the 25th and 26th of November 1743, and was supported by *Skinner*, *Prime*, and *Willes*, King's Serjeants and *Draper* Serjeant, and was resisted by *Belfield*, *Wynne*, and *Bootle*, Serjeants, when the Court over-ruled all the objections, except the last: but thinking that a question of great importance, it was referred to the consideration of all the Judges.

In answer to the first objection, they said it was not competent to the defendant to object to the evidence given by the plaintiff's witnesses of money having been given by the defendant's agents to other voters, that evidence having been given on the cross examination, and in consequence of questions put by his own counsel.

Secondly, That the poll given in evidence was properly received; for that, as it was signed by the Mayor, it might be considered as an original (a); or if it were only an examined copy, it was admissible in evidence as such; on the same ground as copies of books of a public nature, registers of births marriages and burials; and that perhaps even parol evidence of voting was admissible. And they relied on a case, *R. v. Hughes*, *H. 1 Geo. 2. B. R.*, in which after great debate and on the authority of several cases there cited, the copy of the poll of the election of a Mayor was holden to be good evidence.

To the third and fourth objections several answers were given; 1st, That two years had elapsed since the offences were committed, and therefore that neither *Ward* or *Billany* could be

(a) Vid. *R. v. Davis*, 2 Str. 1048.

prosecuted under the act (a); 2dly, But even if the offences had been recently committed, *Ward* and *Billany* could only be considered as accomplices (b), and as such they were competent witnesses; 3dly, That in this particular case the Legislature by holding out inducements and offering an indemnity (2 Geo. 2. c. 24. s. 8.) to offenders to discover and bring other offenders to punishment impliedly made the discoverers legal witnesses. And they relied on a case of *Phillips v. Fowler* (c), 8 Geo. 2. in which Lord Chief Justice *Eyre* had admitted an accomplice under the same circumstances as *Ward* and *Billany* to be a witness.

1743.
MEAD
against
ROBINSON.

With regard to the fifth objection;—The conclusion of Mr. Serjt. *Birch*'s report, after setting forth all the evidence, was thus; "I stated the evidence to the jury with such observations thereupon and upon the act of parliament as occurred to me, and the jury found a verdict for the plaintiff for 500*l.* as to the bribing of *Billany*, and for the defendant as to the residue; and the verdict was taken upon the third count (d), the jury declaring that what was done by the defendant's agent with regard to *Billany* they considered as done by the defendant himself." The case, referred to the consideration of all the Judges, stated Mr. Serjt. *Birch*'s report, adding "The Judge having reported that there was no evidence of the defendant's bribing *Billany* himself, and that there was a variety of evidence as to bribing him by *P. Ward* his agent, and the jury having found that the defendant did not

(a) But they might still have been prosecuted as for an offence at common law.

(b) Vid. *R. v. A. Rockwood*, 4 St. Tri. 663; *R. v. C. Cranburne*, ib. 698; and *R. v. Robins and Atwood*, by all the Judges, on a case reserved at the *Bridge-water* summer assizes, 1788.

(c) Cited in *Say. Rep.* 291. The same point was also decided in *Bush v. Ralling*, *Say.* 289. So in a prosecution for penalties under the stat. 9 An. c. 14. s. 5. the loser of money at cards is a good witness to prove the loss; *R. v. Luckup*, M. 9 Geo. 2. B. R. MS. Mr. J. *Wm. Fortescue*—So, on a prosecution for the penalty of 500*l.* under stat. 23 Geo. 2. c. 13. s. 1. for seducing artificers to go out of the kingdom, the prosecutor is a competent witness, though he be entitled to a moiety of the penalty; *R. v. M. Johnson*, on a

question reserved at the *Kingston* spring assizes 1784 for the consideration of all the Judges.—See also *Abrahams q. t. v. Bunn*, 4 Burr. 2251; and *Smith q. t. v. Prager*, 7 D. & E. 60.

(d) It seems extraordinary that the question submitted to the consideration of all the Judges should ever have been raised, because it is evident from the Judge's report that the jury did not intend to confine their verdict for the plaintiff to the third count, but that they wished to leave it to the Court to enter up a proper verdict on the facts found by them, which would have warranted the officer in entering up a verdict on the seventh count; and even the entry of the officer might afterwards have been altered by the Court from the Judge's notes.

1743.

MEAD
against
ROBINSON.

bribe *Billany* by *P. Ward* his agent by finding him not guilty on the seventh count, the question is whether there was sufficient evidence to support the verdict for the plaintiff on the third count?"

This question having been argued before all the Judges, a majority (a) of them were of opinion that the plaintiff was entitled to retain his verdict, and the motion for a new trial was discharged.

The special case, that had been reserved at the trial, was then argued in the Common Pleas; and it was on a point of evidence. "On behalf of the plaintiff the under-sheriff produced the precept itself mentioned in the declaration under the seal of the office of the sheriff signed and returned by the mayor to the sheriff together with the indenture, which indenture without the precept was returned with the writ by the sheriff; the under-sheriff proving the practice there to be not to return the precept along with the indenture. It was objected on the part of the defendant that the precept together with the indenture ought to have been returned and filed in Chancery, and that a copy of the precept on record ought to have been produced."

This case was argued on the 23d of *April* 1744 by *Bootle* Serjt. for the plaintiff and *Prime* King's Serjt. for the defendant, when

The Court said "It was not laid in the declaration that the precept was returned, but only that such precept issued; and therefore they were all of opinion that the evidence produced

(a) All the Judges, except Mr. J. *Fortescue* *Aland* and Mr. Baron *Carter*, assembled at *Serjeants' Inn* to hear this case argued by *Willes* and *Draper* Serjeants for the defendant, and the *Solicitor-General* and *Bootle* Serjt. for the plaintiff; and on the 8th of *February* being again assembled at Lord Chief Justice *Lee*'s chambers they gave their opinions seriatim. *Lee* Lord Chief Justice *B. R.*, *Parker* Lord Chief Baron, and *Chapple*, *Wright*, and *Denison*, Justices of the King's Bench, and *Reynolds* and *Clarke*, Barons, were of

opinion with the plaintiff; and *Willes* Lord Chief Justice *C. B.*, and *Abney* and *Burnett* Justices of *C. B.*, were of a contrary opinion—"And the next day the Chief Justice (*Willes*) declared that he thought that the Court of Common Pleas were bound by the opinion of the majority of the Judges, and against the opinion of this Court gave the rule that the verdict as to the question above stated should not be set aside, but should stand." MS. *Abney* J.

was

was sufficient, and that there was no occasion to shew that it was returned. They thought likewise that the original was better evidence than the copy. However it being strongly insisted on by the counsel for the defendant, the Court gave them leave to speak to it again the next term."

1743.
MEAD
against
ROBINSON.

It was accordingly spoken to again in the *Trinity* term following, on the first of *June*, by *Wynne* Serjt. for the plaintiff, and *Willes* King's Serjt. for the defendant, when the Court, retaining their former opinion, ordered the *poslea* to be delivered to the plaintiff.

Afterwards, on the 7th of *June*, the motion in arrest of judgment was argued. The objection was that it was not directly alleged in the third count that the defendant gave the ten guineas to *Billany* for the purpose of bribing him to give his vote, but only that he gave him that sum "as a gift or reward for *Billany*'s giving his vote &c." But

The Court were clearly of opinion that this objection was not well founded; for that *as* was in many cases an averment (a), and traversable; that it was to be construed according to the subject-matter to which it was applied, and that here it was used in the same sense as *for* a gift or reward; and that the third count would have been sufficient without these words.

So the plaintiff had judgment.

(a) Vid. *Eaton v. Southby*, *H. 12 Geo. 2. sup.* 134., and the cases there referred to.

FANN *against* ATKINSON.

"*PRIME* moved to set aside a judgment entered up pursuant to a warrant of attorney executed not quite a year before, because the party (defendant) died before the signing of the judgment. The judgment was signed *October* 1st, and the defendant died the 27th of *September* before.

But *The Court* denied the motion, because the judgment was a judgment of the precedent term; and this had been so de-

M. 17 Geo 2.
Thursday,
Nov. 10th.

Court refused to set aside judgment signed after death of defendant, because a judgment of the precedent term when defendant was alive.

1743.

FANN
against
ATKINSON.

terminated before several times both in this Court and the Court of B. R. (a)."

(a) "*Savil v. Wiltshire* executor of *Wiltshire* E. 19 Geo. 2.—The testator died in *Essex* about forty miles from *London* on the 20th of *April* 1744; judgment was signed against him on the next day by virtue of a warrant of attorney, dated 4th *March* 1741; *Easter* term in 1744 began on the 11th of *April*; and the rule was made on an affidavit that the testator was alive on the 10th of *April*.

To set aside this judgment affidavits were read, stating that the testator died on the 20th of *April* 1744, on a day subsequent to the day of signing the judgment; and all the cases in *Hail v. Moss*, T. 16 & 17 G. 2. in this court were cited. But

The whole Court, conformably to the opinions of this Court and B. R. in all the cases, refused to set aside the judgment; and were of opinion that the statute 29 Car. 2. c. 3. strengthened this case; for that statute was drawn by Lord Chief Justice *Hale*, and provided only for judgments affecting land in case of purchasers, leaving them in all other cases to the course of the Court, when though entered after the death of the parties they have relation to the first day of the term if signed in term, if signed out of term to the first day of the preceding term. Nay, as *Abney J.* observed, in the case of lands they affect the land from the day of the actual signing by the officer, and which may be after the death of the party. Vide the words of the stat. 29 Car. 2. c. 3. s. 14. And it seemed to *Abney J.* that though the statute prevents a retrospect of judgment in favor of purchasers, it doth not in favor of the heir of the conusor of the judgment." MS. *Abney J.*—*Barnes* 270. S. C.

Nor is there any difference in this respect between adverse judgments and those signed under warrants of attorney. "*Joseph Hall v. A. Moss*, T. 16 & 17 G. 2. *Moss* died intestate on the 16th of *February* last: interlocutory judgment was signed 21st of

February. It was insisted that as this case was an adverse suit, it was irregular, on a motion by *Draper Serjt.* to set aside the judgment; and he cited 8 & 9 W. 3. c. 11. s. 6; 6 Mod. 142; and *Salk.* 315.

Burnett J. In *Norton v. Oliver* in this court T. 15 & 16 Geo. 2. after the death of the plaintiff his executors signed an interlocutory judgment, and the Court refused to set it aside.

Abney J. mentioned the case of *Fuller v. Jocelyn* (1), executor of *Twisden*, T. 3 & 4 G. 2., and M. 4 G. 2. B. R. *Twisden* on the 10th of *April* gave a warrant of attorney to confess a judgment, and died on the 18th: on the 22d of *April* the plaintiff signed his judgment, and on the 23d took out execution, the term beginning on the 15th of *April*: and the Court on consideration and on the authority of *Parsons v. Gill*, *Farresley* 93; *Salk.* 87, 401; refused to set aside the judgment.

Willes Ch. J. I see no difference between voluntary and adverse judgments: if there be any, the case of an adverse judgment is stronger. Nor is there any difference between plaintiffs' executors and defendants' on stat. 8 & 9 W. 3.

Draper Serjt. then said that there was no administration at all, though there were two niths returned on a scire facias in this case. And he said there could be no administration when the scire facias issued, for it was within less than fourteen days after the intestate's death.

But the Court held the judgment regular in the case now at bar.

See statute 29 Car. 2. c. 3. s. 21.

—*Poulsen v. Francia* (2), T. 13 An. B. R. A scire facias was brought by *Elizabeth Poulsen* administratrix of *George Poulsen* against *Francia* to revive a judgment recovered by the intestate against the defendant; and the scire facias alleged the death of *G. Poulsen* on the 1st of *March*, and the administration granted on the 5th of

Administra-
tion may be granted
within 14 days
of the intestate's
death.

(1) 2 Str. 882; and *Rep. temp. Hardw.* 158. by the name of *Fuller v. Johnson*.

(2) *Lill, Entr.* 405.

of the same month. On demurrer it was objected that by the stat. 29 Car. 2. c. 3. administration ought not to be granted until fourteen days after the death of the intestate. — *Curia*, contra. Administration may be granted immediately, otherwise the effects may be wasted and em-

bezzled. Judgment for the plaintiff. *E. 13 An. Rot. 45. B. R.* MS. *Abney J.* — As to the principal point, see also *Bragner v. Langmead*, 7 D. & E. 20, in which all the former cases on this subject are collected.

1743.

FANN
against
ATKINSON.

LINDON *against* COLLINS.

“**R**EPLEVIN; avowry for a rent-charge; the plaintiff was nonsuited.

A motion for double costs on the stat. 11 G. 2. c. 19. s. 22. (a). The only question was whether a rent-charge be within the words or intention of that clause in the statute which gives double costs in case the plaintiff be nonsuit &c. It being a new case, we ordered it to be moved again, and the statute to be looked into and well considered (b).

It was objected likewise that, the defendant having avowed specially, and not taken the benefit of the statute, this case was not within the statute: but the Court thought there was nothing in this objection.”

(a) By sect. 22. “After reciting that great difficulties often arise in making avowries or confuance upon distresses for rent, quit rents, reliefs, heriots, and other services, it is enacted &c. that it shall be lawful for all defendants in replevin to avow or make confuance generally that the plaintiff in replevin or other tenant of the lands and tenements whereon the distress was made enjoyed the same under a grant or demise at such a certain rent during the time wherein the rent distrained for incurred, which rent was then and still remains due, or that the place where the distress was taken was parcel of such certain tenements held of such manor &c. for which tenements the rent relief heriot or other service distrained for was due, without further setting forth the grant tenure demise or title of such landlord, lessor, or owner of such manor; and if the plaintiff in such action shall become nonsuit, discontinue, or have judgment given against

him, the defendant in such replevin shall recover double costs of suit.

(b) Though it does not appear from Lord Chief Justice *Willes*’s papers how this case was determined, it appears from Mr. Justice *Abney*’s MS. that the rule, calling on the Prothonotary to review his taxation of (single) costs, was afterwards discharged; the Court being of opinion that though this statute was in some clauses remedial in others it was penal; and that the clause in question, sect. 22. which was a substantive clause, did not in terms include rent-charges, and that as it was a penal clause it ought not to be extended by construction.

It has been since holden that an avowry for a seizure for *heriot custom* is not within this clause of the statute. *Lloyd v. Winton*, 2 *Wilson* 28.; nor an avowry for a rent-charge under a canal act. *The Leominster Canal Company v. Norris*; 7 D & E. 500; and *The Same v. Cowell*, Bos. & Pul. 213.

M. 17 G. 2.
Saturday,
Nov. 19th.

An avowant
for a rent-
charge is not
entitled to
double costs
under 11 G.
2. c. 19.
s. 22., when
the plaintiff
is nonsuited.

1743.

M. 47 G. 2.
Tuesday,
Nov. 22d.

A custom in a manor, that the grantee of a customary estate (which will pass either by surrender or deed and admittance) must be admitted during the life of the grantor, is good in law.

FENN on the Demise of RICHARDS *against* MARIOTT.

"RULE nisi for a new trial. *Bootle* for the rule. *Eyre* contra.

Mr. J. *Burnett* reported from Mr. J. *Denison* who tried the cause at the last *Carlisle* assizes that the premises in question were a customary estate, which would pass either by deed or surrender, but that even in the case of a deed an admittance was necessary. And it was proved in the cause that the grantee of the deed in the present case, under whom the defendant claimed, was not admitted until after the death of the grantor. That there was evidence on both sides as to the custom, but no instance of any person's being admitted after the death of the grantor but one in 1732. But he thought that the strength of the evidence was for the defendant. However the jury found a verdict for the lessor of the plaintiff, who claimed as heir at law.

And it was insisted that a custom that the party should be admitted during the life of the grantor was not a good custom; for that by law a surrenderee might be admitted after the death of the surrenderor, for which was cited a case from *Coke*. And other cases might have been cited, for to be sure this is undoubted law.

But we thought the present case not at all parallel to that; because that depends on the general law of the land in respect to customary estates, but this on the particular custom of the manor. For customary or copyhold estates will not pass by deed, unless there be a particular custom to warrant it; and if there be, such deeds must be attended with such circumstances as the custom requires; and as the jury here, by finding for the plaintiff, have found what the custom was as much as if they had found it by a special verdict, we are of opinion that such custom is good (a).

It was insisted that such custom was unreasonable, and that in the present case it was unjust, because it appeared on the

(a) See *Perryman's case*, 5 Co. 84.

trial that the grantee was a purchaser for a valuable consideration.

1743.

FENN
against
MARIOFF.

But to this we answered that we thought it neither unreasonable nor unjust. It is fit that such grantees should be admitted in some reasonable time, and the custom hath limited that time. And if the purchaser be prejudiced by his not being admitted within that time, he may thank himself; for it was his own fault; for he should not have paid his money until his purchase was completed by his admittance. And a person claiming under a bargain and sale may as well complain of injustice, if he do not enrol his own deed, under which he claims, within six months, by which omission it becomes void."

The Bailiffs and Citizens of the City of LITCHFIELD *against* JOHN SLATER, Assignee of CATH. ADIE Widow.

M. 17 G. 2.
Monday,
Nov. 28th.

THE opinion of the Court was delivered, as follows, by

Willes, Lord Chief Justice. "The action is an action of covenant; in which the plaintiff declares in the county of *Stafford*, in which he brought his action upon a covenant in an indenture made the 10th of *March* 1713, between the bailiffs and citizens of the city of *Litchfield* and the said *Cath. Adie*, by which (as set forth in the declaration) in consideration of the surrender of a former lease of the premises for the term of sixty years bearing date the 8th of *November* 1656, and in consideration of the rents and covenants therein mentioned and reserved, the said bailiffs &c demised to the said *Catharine* all that messuage burgage or tenement with the appurtenances in the said city of *Litchfield* in a certain street there called *Tamworth Street*, and all barns &c, then in the occupation of the said *Catherine*, to hold the premises from the 8th of *November* then last past for the term of 60 years under the rent of 3*l.*, payable half-yearly at *Lady-day* and *Michaelmas*; and *Catharine* covenants for herself her executors administrators and assigns to pay the rent and to keep the premises in repair, and to leave

It is no objection after verdict that an action of covenant for not repairing &c was brought and tried in a foreign county, that defect being cured by the stat. 16 & 17 Car. 2. c. 3.

1743.

The Bailiffs
& of LITCH-
FIELD
against
SLATER.

them so at the end of the term; that *Catherine* entered and was possessed; and afterwards to wit, on the 10th of *October* 1723, assigned (a) all her interest and the term to the defendant, who entered and has been ever since possessed, the reversion belonging to the plaintiffs. And the plaintiffs aver that 21 l. for rent was due at *Lady-day* 1742, and assign that as their first breach; and that the premises were out of repair during the continuance of the term and after the assignment (of which they specify several instances,) and this they assign as another breach; and lay their damages at 200 l.

The defendant pleads that the premises are situate lying and being in the city of *Litchfield* and the county of the same city, and that the defendant after the assignment made to him and before the bringing of this suit, to wit, 25th *March* 1735, at the city of *Litchfield* aforesaid in the county of the same city surrendered up the said premises and all the residue of the term to the said bailiffs and citizens, and that they then and there accepted of the same; and saith that at the time of the said surrender no rent was then due or in arrear; and that from the time of the said assignment to the time of the surrender he always kept the premises in good repair according to the covenant.

The plaintiffs reply; and protesting that there was no such surrender, traverse the acceptance, and on this issue is joined; and a verdict was found for the plaintiffs at the *Stafford* assizes.

And the defendant having moved (b) in arrest of judgment, it stands now for the judgment of the Court on that motion. There was but one objection taken, that the cause was tried in the county of *Stafford*, whereas it ought to have been tried in the county of the city of *Litchfield*. The question therefore is whether this was a mis-trial or not; and this will produce two questions;

First, whether it would have been bad at common law;

(a) In covenant (which runs with the land) evidence that the defendant is in as heir will support a declaration charging him as assignee. *Derisley v. Custance*, 4 D. & E. 75.

(b) The case was argued on the 20th of June 1743 by *Skinner* King's Serjt. and *Bootle* Serjt. for the plaintiffs, and by *Draper* and *Belfield* Serjts. for the Defendant.

Secondly;

Secondly, Whether or not, if it would have been bad at common law, it be aided by the 16 & 17 *Car.* 2. c. 8. f. 1. For as for the other statutes of jeofails, we think that it is not helped by any of them. As for the stat. 4 & 5 *An.* c. 16. f. 6., which was relied on to make this a bad trial, we think it is quite out of the case; for as the statute was plainly made to extend the statute *Car.* 2. farther than it went before and to remove a difficulty which plaintiffs then laboured under by reason of challenges for defaults of hundredors, it is putting a strange construction upon it to say that plaintiffs by that statute were put under greater difficulties than before. But barely reading the words themselves will shew that no such construction as is contended for ought to be put upon them. The words are "And whereas great delays do frequently happen in trials by reason of challenges to the arrays of pannels of jurors and to the polls for default of hundredors, for prevention thereof for the future be it enacted that from and after &c every venire facias for the trial of any issue in any action or suit in any of her Majesty's Courts of Record at *Westminster* be awarded of the body of the proper county where such issue is triable;" the meaning of which is plainly this that for the future venires shall be awarded of the body of the county without any regard to hundredors, but it gave no directions in what counties issues are to be tried but left the law just as it stood before in respect to this matter. Having laid this statute out of the case, I shall only say this farther before I come to the merits of the cause, that we ought in this case to go as far as we can in order to make the verdict good, both because the point has been fairly tried, and likewise because it has been tried in a county where the defendant was more likely to have justice done him than if it had been tried in the county of the city of *Litchfield*, the bailiffs &c being plaintiffs.

1743.
The Bailiffs
&c of LITCH-
FIELD
against
SLATER.

I shall now come to the two points on which the question depends. And

First, we are of opinion that this trial would have been bad at common law, if not aided by the statute 16 & 17 *Car.* 2. We think that actions of covenant for nonpayment of rent or not repairing are local actions. The case of *Barker v. Damer* as it is reported in 1 *Salk.* 80. seems to be an authority as to this point.

1743.
 The Bailiffs
 & of LITCH-
 FIELD
 against
 SLATER.

point. But that case is reported differently in other books (a); and it is very doubtful whether in that case any judgment was ever given. And the contrary was held in the case of *Smith v. Batten Cro. Jac. 142.*, and in several other cases. However, be that as it will, and whether they are local actions or not when brought by the covenantee himself against the covenantor himself, yet there can be no doubt in the present case, the action being brought against an assignee not as he is in privity of contract but only as he is in privity of estate. As therefore it appears upon the pleadings that the premises lie in the county of the city of *Litchfield*, we think that the action by the rules of the common law ought to have been tried there (b). But if it had stood on the declaration only, this objection would not have arisen; for the premises there are only said to lie in the city of *Litchfield*; and though we are to take notice judicially of counties, we cannot judicially take notice of the boundaries of counties, nor that the whole city of *Litchfield* lies within the county of the city. But the objection arises from the plea, it being there alleged and not denied by the plaintiffs that the premises lie in the county of the city of *Litchfield*.

As to the objection that the surrender and acceptance were in the county of the city of *Litchfield*, we do not rely much upon it, because though it is held in *2 Rol. Abr. 611. (c)* that if the surrender of a lease be pleaded in another county the cause shall be tried there, I am not satisfied of the authority of that case (d). But if it were law, the case was determined before the statute *21 Jac. 1. c. 13. s. 2.*, which has enacted that no verdict shall be stayed or reversed if the venire be awarded from any of the places where any part of the matter in question arises. And therefore we think that, if there were no other objection, this statute would cure it, but for the other reason we think that this trial would have been bad before the statute *16 & 17 Car. 2.*

(a) Vid. *Carth. 182; 3 Mod. 337;* and *1 Show. 191. S. C.*

(b) But see *The Mayor &c of London v. Cole, 7 D. & E. 587.* per Lord Kenyon Chief Justice cont. and per *Grose J. 588.* accord.

(c) *Pl. 33.*

(d) In *Bulwer's case, 7 Co. 2. a.*, this

rule was laid down "In all cases where the action is founded upon two things done in several counties, and both are material or traversable, and the one without the other doth not maintain the action, there the plaintiff may choose to bring his action in which of the counties he will."

Secondly;

Secondly; The only question therefore that remains is, whether it be helped by the stat. 16 & 17 *Car. 2.* And if this were a new case upon this statute, we should doubt very much whether this statute would help it, and for my own part I should be of opinion that it did not. The words of the statute are, "If there be a verdict, judgment shall not be stayed or reversed for that there is no right venue, so as the cause were tried by a jury of the proper county or place where the action is laid." And from these words I am of opinion that the statute was never intended to cure these defects where the cause appears to be tried in an improper county, but only those where the venue was wrong, which meant no more at that time than that the jury were not returned de vicineto, or in other words that there were no hundredors returned: but the statute expressly says that it must be tried in the proper county; and I think that the word *laid*, which has been so often insisted on, will not bear the construction that has been put upon it. But I admit that the authorities are most of them on the other side; and therefore as I am going to give a judgment not founded on our own opinions but only on the strength of authorities, it will be proper for me to mention all the cases which have been determined on this head. The first case that I can meet with is the case of *Craft v. Boite*, 1 *Saund.* 247. *P. 21 Car. 2. B. R.* There the action, as in the present case, was tried in a wrong county; and *Keeling* Chief Justice, *Rainsford J.* and *Morton J.* held that it was helped after verdict by the 16 & 17 *Car. 2.*: But *Twisden J.* held strongly the contrary. But *Saunders* says that judgment was given for the plaintiff against the opinion of *Twisden* and many others. The next is the case of *Naylor* versus *Sharpley &c.* *P. 26 Car. 2. B. C. 1 Mod.* 198., where this question was started but it was not the point on which the judgment was given. But the Judges said that where the trial was in a wrong county, the stat. 16 & 17 *Car. 2.* would not help it, for that it was intended only to help where the action was laid in the proper county where it ought to be laid, which the word *proper* implied. The next case is that of *Jennings v. Hunkin*, *H. 27 Car. 2. B. R. 2 Lev.* 121., where the action was tried in an improper county, and it was insisted that it was aided by the said statute: but *Hale* Chief Justice said that the intent and meaning of the statute is if the cause be tried in a county where the matter in

1743.
The Bailiffs
&c of LITCH-
FIELD
against
SLATER.

1743.

The Bailiffs
& of LITCH-
FIELD
against
SLATER.

issue to be tried arises; for it cannot reasonably be supposed that the parliament intended to alter the course of trials and to have things tried in foreign counties where the jury are strangers to the parties, to the evidence, and to the matter in issue: but the intent of the statute was to cure trials and improper venues taken in the same county where the matter ought to be tried; and the rest of the Justices agreed that this was a reasonable construction of the statute, but said that they would advise on it; and *Ventris*, who reports the same in his 1st vol. 263., says that afterwards on further consideration and upon the authority of the case in *Saunders* and another case adjudged the very same term in *B. C.* the Court gave judgment for the plaintiff; it being within the words, though they still said it was not within the meaning, of the statute. In the case of *Adderley and Wise*, *H. 27* and *28 Car. 2. B. C.* (and which I believe is the other case that *Ventris* hints at) reported in *2 Lev. 164.* it was held by Lord Chief Justice *Vaughan* and the whole Court that though the cause was tried in an improper county, yet that it was helped by the express words of the statute, because it was tried in the county where the action was brought. In the case of *Drew v. Barksdale*, reported in *1 Show. 343. M. 3 W. and M. B. R.* it was said per *Holt* and the whole Court that the trial being there in a wrong county was helped by the statute *16 & 17 Car. 2.*: but this case is very shortly reported as to this point. The last case which I shall mention, and which is the case which I must rely on, is the case of the Lady *Calverly v. Sir R. Leving*, *P. 10. W. 3. B. R.*, reported in *Comb. 472.* and *Carth. 448*, but best and most fully in *Lord Raym. 1 vol. 330.*; and therefore I shall state it as it is there reported; and it is a case of great authority and exactly the same as the present. It was an action of covenant for not repairing a house in the county of the city of *Chester*, and it was tried by the Chief Justice of the county of *Chester*. The case was very thoroughly argued; and *Cheeshyre* for the plaintiff cited many authorities and (inter alia) a case between *Jew and Briggs* adjudged (as he said) since the Revolution, where the issue arose in *Surry* but was tried in *Middlesex*; and it was adjudged by three Judges against the opinion of Lord Chief Justice *Holt* that this was aided by the statute *16 & 17 Car. 2.*; and on a writ of error brought in *Cam. Scacc.* all the Judges, except *Treby* Chief Justice, *Powell*, and *Lechmere*, were of opinion to

affirm the judgment; and afterwards *Treby* declared in *B. C.* that he would submit to the opinion of his Brothers. And though the construction was very difficult to be maintained if it were *res integra*, yet since there were so many authorities for this construction, he desired that the plaintiff might have judgment; and *Holt* likewise afterwards said that he would conform to so many authorities, though he believed that they could not be maintained by reason; but in respect to the multitude of cases he complied, and judgment by the whole Court was given for the plaintiff.

I think therefore that we are fully justified in the opinion that we should have been of concerning the construction of this statute if this were *res integra*, as Lord Chief Justices *Hale*, *Holt*, *Treby*, and so many other great men were of the same opinion with us; and I think we are likewise justified in giving our judgment contrary to our own opinions, since there are so many authorities on the other side; for nothing can be a greater inconvenience than that the law should be always uncertain, which yet must be the case if the Courts of *Westminster-Hall* did not think themselves bound in cases where there are so many authorities as there are in the present case. And I own for my own part I the more willingly come into this opinion, because the justice of the case is certainly on this side; and if I had been to draw the statute 16 & 17 *Car. 2.*, I would have drawn it in such words as would have borne this construction. The rule therefore must be discharged, and the plaintiffs must have their judgment (a)."

———"N. Mr. Justice *Fortescue A.* was not present either at the argument or giving the judgment."

(a) The same construction has also been put on the stat. 16 & 17 *Car. 2.* in a subsequent case, *The Mayor &c of London v. Cole and others*, E. 38 *Geo. 3.* 7 *Durnf. & East* 583, in which the above case was not cited.

1743.

The Bailiffs
&c of LITCH-
FIELD
against
SLATER.

1743.
The Bailiffs
& of LITCH-
FIELD
against
SLATER.

issue to be tried arises; for it cannot reasonably be supposed that the parliament intended to alter the course of trials and to have things tried in foreign counties where the jury are strangers to the parties, to the evidence, and to the matter in issue: but the intent of the statute was to cure trials and improper venues taken in the same county where the matter ought to be tried; and the rest of the Justices agreed that this was a reasonable construction of the statute, but said that they would advise on it; and *Ventriss*, who reports the same in his 1st vol. 263., says that afterwards on further consideration and upon the authority of the case in *Saunders* and another case adjudged the very same term in *B. C.* the Court gave judgment for the plaintiff; it being within the words, though they still said it was not within the meaning, of the statute. In the case of *Adderley and Wife*, *H. 27* and *28 Car. 2. B. C.* (and which I believe is the other case that *Ventriss* hints at) reported in *2 Lev.* 164. it was held by Lord Chief Justice *Vaughan* and the whole Court that though the cause was tried in an improper county, yet that it was helped by the express words of the statute, because it was tried in the county where the action was brought. In the case of *Drew v. Barksdale*, reported in *1 Show.* 343. *M. 3 W. and M. B. R.* it was said per *Holt* and the whole Court that the trial being there in a wrong county was helped by the statute *16 & 17 Car. 2.*: but this case is very shortly reported as to this point. The last case which I shall mention, and which is the case which I must rely on, is the case of the *Lady Calverly v. Sir R. Leving*, *P. 10. W. 3. B. R.*, reported in *Comb.* 472. and *Carth.* 448, but best and most fully in *Lord Raym.* 1 vol. 330.; and therefore I shall state it as it is there reported; and it is a case of great authority and exactly the same as the present. It was an action of covenant for not repairing a house in the county of the city of *Chester*, and it was tried by the Chief Justice of the county of *Chester*. The case was very thoroughly argued; and *Chefbyre* for the plaintiff cited many authorities and (inter alia) a case between *Few* and *Briggs* adjudged (as he said) since the Revolution, where the issue arose in *Surry* but was tried in *Middlesex*; and it was adjudged by three Judges against the opinion of Lord Chief Justice *Holt* that this was aided by the statute *16 & 17 Car. 2.*; and on a writ of error brought in *Cam. Scacc.* all the Judges, except *Treby* Chief Justice, *Powell*, and *Lechmere*, were of opinion to affirm

affirm the judgment; and afterwards *Treby* declared in *B. C.* that he would submit to the opinion of his Brothers. And though the construction was very difficult to be maintained if it were *res integra*, yet since there were so many authorities for this construction, he desired that the plaintiff might have judgment; and *Holt* likewise afterwards said that he would conform to so many authorities, though he believed that they could not be maintained by reason; but in respect to the multitude of cases he complied, and judgment by the whole Court was given for the plaintiff.

1743.
The Bailiffs
& Co of LITCH-
FIELD
against
SLATER.

I think therefore that we are fully justified in the opinion that we should have been of concerning the construction of this statute if this were *res integra*, as Lord Chief Justices *Hale*, *Holt*, *Treby*, and so many other great men were of the same opinion with us; and I think we are likewise justified in giving our judgment contrary to our own opinions, since there are so many authorities on the other side; for nothing can be a greater inconvenience than that the law should be always uncertain, which yet must be the case if the Courts of *Westminster-Hall* did not think themselves bound in cases where there are so many authorities as there are in the present case. And I own for my own part I the more willingly come into this opinion, because the justice of the case is certainly on this side; and if I had been to draw the statute 16 & 17 *Car. 2.*, I would have drawn it in such words as would have borne this construction. The rule therefore must be discharged, and the plaintiffs must have their judgment (a)."

—"N. Mr. Justice *Fortescue A.* was not present either at the argument or giving the judgment."

(a) The same construction has also been put on the stat. 16 & 17 *Car. 2.* in a subsequent case, *The Mayor &c of London v.*

Cole and others, E. 38 Geo. 3. 7 Durnf. & East 583, in which the above case was not cited.

1743.

M. 17 Geo. 2.
Monday,
Nov. 28th.

TURNER *against* HORTON.

[Hil. 16 GEO. 2. Rol. 311.]

In actions of slander where the words themselves are actionable, if the plaintiff recover less than 40s. damages, he is entitled to no more costs than damages, though special damages are also alleged: but where the words themselves are not actionable, the plaintiff is entitled to full costs, though he recover less than 40s. damages.

Barnes 132.
S. C.

THE following opinion of the Court was given by

Willes, Lord Chief Justice. "This comes on before the Court on a motion (a) for full costs, notwithstanding the 21 Jac. 1. c. 15.

The action is an action on the case for words. There are eight sets of words in the declaration. The plaintiff sets forth that he is by trade a baker, and all the words are laid to be spoken of him in respect to his trade, and as so spoken all of them are actionable. Special damages are laid that two persons (naming them) who used to deal with the plaintiff and give him credit refused to deal with him and give him credit by reason of the speaking of these words.

A general verdict for the plaintiff and two pence damages. I tried the cause last *Hilary* term at *Guildhall*, but will endeavour to forget what passed at the trial, (where it appeared to be a most frivolous action) because the question must be determined on the record, and not on any particular report of mine.

The words of the stat. 21 Jac. 1. c. 15. §. 6. are very strong, that in all actions on the case for slanderous words there shall be no more costs than damages, if the verdict be for less than 40s. And if it were a new case, I should not be of opinion to take many of those cases (which have been so determined to be) out of the statute. And I am now against going a jot farther than the authorities will warrant, and think it best to adhere to some certain rule. The case of *Topsall* and *Edwards*, *Cro. Car.* 163., was not only for words, but likewise for procuring the plaintiff to be indicted and imprisoned for felony. The case of *Blizard v. Barns*, *Cro. Car.* 307., was for words and likewise for procuring the plaintiff to be arrested for felony and imprisoned for three days. The case of *Fish* and *Philips* in *B. R.* 11 Geo. 1. was for words and also for carrying the plaintiff before a justice

(a) The case was argued by *Skinner* by *Prime* King's Serjeant on the other King's Serjeant in support of the rule and side on the 23d of November 1743.

of the peace and detaining him. It is certain that actions of slander of title will not lie unless special damages be alleged and proved; and for this reason it has been holden that they are not within the statute; and therefore the plaintiff shall have full costs though the damages found be under 40 s., as was holden in *Cro. Car.* 140, 1; and 1 *Jon.* 196. But none of these cases are at all parallel to the present. But in the case of *Burry v. Perry*, which was a case very like the present, and which was solemnly argued and thoroughly considered, *Tr. 5 & 6 Geo. 2. B. R. 2 Lord Raym.* 1588. (a), it was holden that, where the words were in themselves actionable, being laid to be spoken of a man in the way of his trade (as in the present case) though special damages were laid, the damages given by the jury being under 40 s., the plaintiff should have no more costs than damages; and the Court founded this their opinion on the case of *Brown v. Gibbons*, 1 *Salk.* 206., and many other cases; and they laid down this rule that when the words are actionable, though special damages are laid, it will not alter the case; but when the words are not actionable, and special damages are laid, it is not a case within the statute, because properly speaking the action is not for words but for the special damages. And I am willing to abide by this rule and this distinction, but not to go a jot farther. For where the damages are laid only by way of aggravation, a verdict must be for the plaintiff, if the words be proved though the damages be not: but where they are the gift of the action, if the damages be not proved, the verdict must be for the defendant; and there can be no such thing in either case as a verdict for the plaintiff as to the words and for the defendant as to the special damages. In the case cited for that purpose out of 1 *Ventr.* 53; 1 *Mod.* 31; and 2 *Keb.* 589; there was a special verdict found for the opinion of the Court whether the words were actionable of themselves. The case of *Denny v. Wigg* (b) in this court *M. 10 Geo. 2.* is a case of but very little authority, as there were but two Judges in Court, as it was very little considered, and as it is directly contrary to the case of *Burry* and *Parry* which was so solemnly considered and determined. As to the case of *Lazenby v. Cooke* (c), I shall say no more of it but that it was not considered at all; that I was borne

1743.
TURNER
against
HORTON.

(a) 2 *Str.* 936. S. C.

(b) *Pract. Reg.* 111; and *Sir G. Co.* 137.

(c) *M.* 13 *Geo. 2.* C. B.

1743.

TURNER
against
HORTON.

down by the authority of *Denny and Wigg*, and that I did not concur in that resolution.

And in the present case I shall say no more but that for the reasons already given we think there ought to be no more costs than damages. Therefore for the future it is to be the settled rule of this Court that where the words themselves are actionable, and the damages are laid only by way of aggravation, if the verdict be under 40 s. there are to be no more costs than damages (a). But if the words be not actionable and the special damages are laid, in which case they are the very gift of the action and the plaintiff cannot recover without proving them, if the verdict be for the plaintiff, though the damages are under 40 s., the plaintiff shall have full costs."

—"N. Mr. J. Fortescue A. was not in court either at the time of the argument or giving this judgment, but having heard of our opinion has declared that he differs from us, and that he adheres to the opinion which he gave in the case of *Denny and Wigg*."

(a) *Tiffin v. Glasf*, *Barnes* 142; *Surnam v. Shelleto*, 3 *Burr.* 1688; and *Collier v. Gaillard*, 2 *Bl. Rep.* 1062. S. P. But if some of the counts in the declaration be for words that are actionable, and others for words not actionable, and spe-

cial damage be laid referring to all the counts, and a general verdict for the plaintiff, he is entitled to full costs, though he recover less than 40 s. damages. *Saville v. Jardine*, 2 *H. Bl. Rep.* 531.

H. 17 G. 2.
Monday,
Feb. 13th.

The Mayor and Commonalty of the Borough of PLYMOUTH against WERRING.

Where a penalty is given by a statute (even subsequent to the statute of Gloucester) to the party grieved, he is entitled to costs if he succeed: and if he be nonsuit, or a verdict pass against him, he is liable to pay costs to the defendant either under the 23 H. 8. c. 15. or 4 Jac. 1. c. 3. which gives costs to the defendant in all cases where the plaintiff is entitled to costs if he succeed.

—The stat. 18 Eliz. c. 5. s. 3., which gives costs to defendants in popular actions if the plaintiff be nonsuit, extends to subsequent as well as prior statutes.

"THE action was brought against the defendant on a private act of parliament, made 27 *Eliz.* c. 20. The plaintiffs sue as well for the King as themselves for the penalty of 20 l., given half to them and half to the King by that statute. By the statute a power is given to the plaintiffs to make a cut or trench therein described to bring the river *Mew* otherwise *Merry* to the town of *Plymouth*, and a penalty of 20 l. upon

any

any one that shall at any time thereafter obstruct or disturb them, to be paid as aforesaid. The plaintiffs declare that they finished the said trench &c, and made reparation from time to time &c, but that the defendant 2d September 1742 broke and destroyed the banks of the said watercourse, and obstructed hindered and diverted the course of the said river and water from its course to the town of *Plymouth*, contrary to the statute, whereby an action accrued to them &c to demand the said 20 l. &c.

1743, 4.
The Mayor
&c of PLY-
MOUTH
against
WERRING.

The defendant pleaded nil debet; and the plaintiffs were nonsuit at the assizes held for the county of *Devon*.

A motion (a) had been made for the defendant for costs, and a rule nisi had been obtained, and *Belfield* had been heard against it. And now the Court gave judgment that the defendant was entitled to his costs.

We were of opinion that common informers, if nonsuited, ought to pay costs by the stat. of the 18 Eliz. c. 5. s. 3. And we thought that that extended as well to informations brought upon penal statutes made afterwards (b) as those which were in force at that time. But this case is excepted out of that statute by the proviso sect. 6. which is in these words; "provided always that this act shall not extend to any person or body politic to whom or to whose use such penalty forfeiture or suit is or shall be specially given by any statute."

As this case therefore is not within this statute, the only question in the present case was whether the plaintiffs would have been entitled to costs in case they had recovered a verdict against the defendant; because if they would, we were of opinion that the defendant in this case was entitled to costs, either by the 23 H. 8. c. 15. s. 1. or by the 4 Jac. 1. c. 3. entitled "an act to give costs to the defendant on a nonsuit of the plaintiff or a verdict against him." The words of the statute are that the defendant or defendants shall have costs in several actions (naming them,) and in any other action whatsoever wherein the plaintiff might have costs in case judgment should be given for him, if the plaintiff or plaintiffs be nonsuited or a verdict pass against

(a) It appears that this motion was made by Mr. Serjt. *Wynne*; and the case was argued on Saturday the 4th of February.

(b) This was so determined in *Williams* q. t. v. *Drewe*, sup. 392. See also the cases there referred to in note.

1743, 4.

The Mayor
& Co of PLY-
MOUTH
against
WERRING.

him or them in such action. And we were of opinion that the plaintiffs would clearly have been entitled to costs, if they had recovered in this suit, by the statute of *Gloucester*, 6 Ed. 1., and the construction which has been all along put upon it. Lord Coke 2 *Inst.* 289. says that this statute doth extend to give costs in all cases where damages are given to any demandant or plaintiff in any action by any statute made *after* that parliament. In 10 Co. 116. it is said that in all cases where a man recovers damages, he shall have costs (a). In *Cro. Car.* 559, *North v. Wingate*, it is holden that when a certain sum is given by a statute to the party grieved, he shall recover costs, otherwise he would be a loser by expending more than he recovered, which the statute could never intend. In 1 *Lutw.* 201. it is said that when a certain sum is given to the party grieved, there he shall recover costs and damages. The case of *Eaton v. Barker*, 1 *Ventr.* 133. 23 *Car.* 2. B. R. was thus; an action popular was brought on the 17 *Car.* 2. for residing in a place where the defendant had formerly kept a conventicle; verdict for the plaintiff, who afterwards moved that he might have his costs: but the Court held that they ought not to be given in actions popular, whether the forfeiture be certain or not; but where a certain penalty is given to the party grieved, he shall have both costs and damages. In the case of *The Corporation of Cutlers v. Ruslin*, M. 5 W. & M. B. R. *Skinner* 363. it was holden that the plaintiffs should have their costs, the action being brought by the parties grieved. And in a case determined the very same term upon this very act of parliament between the *Corporation of Plymouth and Collins*, reported in *Cartbrow* 230, it was adjudged per totam Curiam that the plaintiffs should have their costs, because the penalty was given to the persons grieved; and the case of *The Corporation of Cutlers v. Ruslin*, determined in the same term, was cited as an authority in that case.

As therefore the plaintiffs would have been entitled to costs, of consequence the defendant is entitled to costs in the present case. The only case that was cited to the contrary was out of

(a) In the original this general proposition is qualified thus; "which is meant of all cases where he should recover damages either before the said act of the 6 Ed. 1. or by the said act." But that is not only contrary to the doctrine laid down by Lord Coke himself in 2 *Inst.* 289, but it has since been contradicted in 2 *Wiff.* 92; and 1 *D. & E.* 72.

Hutton 22: but in that case it was only determined that it was not a case within the 23 *H. 8.*, because it was a suit on a subsequent statute, viz. 5th *Eliz.*; nor within the 4 *Jac. 1.*, because an action where the plaintiff was not at all damnified, so not at all parallel to the present case.

1743, 4.

The Mayor
&c of PLY-
MOUTH
against
WERRING.

So we made the rule absolute for costs (a)."

(a) See also 1 *Ld. Raym.* 172; *Great-ham v. The Inhabitants of the Hundred of Theale*, 3 *Burr.* 1723; *Witham v. Hill*, 2 *Willf.* 92; *Wilkinson q. t. v. Allot, Cowp.* 366; *Jackson v. The Inhabitants of Calesworth*, 1 *D. & E.* 71; *Woodgate v. Knatchbull*, 2 *D. & E.* 154; *Creswell v. Hoghton*, 6 *D. & E.* 355; *Tyte v. Glode*,

7 *D. & E.* 267; and *Ward v. Snell*, 1 *H. Bl. Rep.* 10.—It has also been ruled that an action given by statute to the party grieved is not within the stat. 31 *Eliz. c. 5.* which limits the bringing of actions on penal statutes. *Calliford v. Blawford*, 1 *Show.* 353; and *Spieres v. Frederick*, 1 *T. 25 G. 3. B. R.*

LLOYD against MORRIS.

E. 17 Geo. 2.
Friday,
April 13th.

"**HAYWARD** moved in arrest of judgment. It was an action for words; and the jury found for the plaintiff, damages two guineas. There was but one count; and the words were "you are a pickpocket and a murderer; you stole a guinea from A.; you killed his cattle, and murdered his child." He insisted that the verdict being general, and some of the words viz. "killed his cattle," not actionable, the judgment ought to be arrested; and he compared it to the case of two counts, in one of which the words are actionable and in the other not. And he cited the case of *How v. Prinn*, 2 *Salk.* 694., which is nothing to the purpose; and the case of *Lloyd v. Pearse*, *Cro. Jac.* 424. which was thus; action for these words "thou art a bankrupt rogue and accounted a common knave; thou art a thief, and hast stolen my corn:" to the first words "thou art a bankrupt rogue and accounted a common knave" the defendant pleaded not guilty; and justified the other words. Verdict for the plaintiff on both issues, 1 s. damages for the first words, and 39 s. for the second, and costs for both; and judgment was reversed, because the first words were not actionable, the plaintiff being neither merchant nor tradesman, and the judgment being entire; for in the judgment the damages were joined though they were severed in the verdict. He cited also the case of

The Court will not arrest the judgment in an action for words in one count, though some of them be not actionable. —Secus, where there are two counts and none of the words in one are actionable, and a general verdict for the plaintiffs.

1744.

LLOYD
against
MORRIS.

Graves v. Blanchett, 6 Mod. 148, where there were two counts in an action for words, and a general verdict and entire damages, and judgment was arrested.

We had none of us much doubt, because this case is very different from the case of two counts, where the defendant might have been found not guilty upon one and guilty upon the other, and the case where the words are severed by the plea, for the same reason. But in this case it was necessary either to find the defendant guilty of the whole or none; and if judgment must be arrested, a man by speaking words not actionable and words actionable together will secure himself from an action, because he must be found guilty of the whole or none.

My Brother Abney indeed thought that if the whole words which are laid in a count are not proved, yet if those which are actionable be proved it is sufficient.

But I and my Brother Burnett thought otherwise; and

In this case *We were all of opinion* that the verdict could not be found otherwise; and we would take it that the jury only gave damages for such part of the words as were actionable, and that the Judge directed them so to do. However we made a rule nisi in order to look into the cases, but declared that our present opinion was that the plaintiff was entitled to his judgment. And afterwards he moved, and had leave to enter up his judgment."

E. 17 Geo. 2.
Tuesday,
17th April.

JOSEPH MARTIN on the Demise of THOMAS TREGONWELL against JOHN STRACHAN and LUKE HARRISON. In Error.

Dom. Proc.

If tenant in
tail of lands
by purchase
under a set-
tlement made
by an ancestor

THIS was an ejectment brought to recover lands in Dorsetshire, and on a trial at bar in the Court of King's Bench in Michaelmas term 1738 the jury found a special verdict, in substance as follows.

ex parte maternâ, with the reversion in fee by descent ex parte maternâ, suffer a common recovery to the use of himself and his heirs, the lands will descend to his heirs ex parte paternâ.

The lands in question were formerly the inheritance of *John Tregonwell* Esq., the great great grandfather of *Thomas Tregonwell* the lessor of the plaintiff; and he died seised thereof in the year 1639, leaving two sons *John* and *Thomas*. *John* the son had issue *John* the grandson, who after his father's death entered and was seised in fee of the lands &c; and had issue two daughters, *Mary* and *Catherine*. That *John* by a settlement, dated the 3d of *June* 1680 made upon the marriage of *Mary* his eldest daughter with *Francis Luttrell*, settled great part of his estate (after some limitations in part to the use of himself and *Jane* his wife as a provision for themselves for life) to the use of *F. Luttrell* for life, remainder to *Mary* for life, remainder to the first and other sons of that marriage in tail male; remainder to her first and other sons by any second or other husband in tail male; remainder to his second daughter *Catherine* for life, with like remainders to her first and other sons in tail male; remainder to the daughters of *Mary* in tail; remainder to the daughters of *Catherine* in tail; and for default of such issue he limited the reversion in fee to his own right heirs. The other part of the estate he settled by the same deed in like manner on his daughter *Catherine* for life, remainder to her first and other sons in tail &c; remainder to his eldest daughter *Mary* for life, remainder to her first and every other sons in tail &c; with the like remainders to the daughters of *Catherine*, and then to the daughters of *Mary* in tail; and for default of such issue he limited the reversion in fee to his own right heir. *John Tregonwell*, the father of *Mary* and *Catherine*, died on the 29th of *January* 1680, having survived his wife; whereupon *Francis Luttrell* and *Mary* his wife in right of *Mary* entered into that part of the estate which was limited to *Mary* and her issue; and upon the decease of *Catherine* who died on the 11th of *August* 1683 under age and unmarried they entered upon the estate settled on *Catherine*; and then the reversion of the whole estate (of which during the life of *Catherine* *Mary* was only a coheir with *Catherine*) descended to *Mary* as right heir of her father. *Francis Luttrell* died in *August* 1690, leaving issue only two daughters *Mary* and *Frances*; and having had a son who died an infant. *Mary* the eldest daughter married *Sir George Rook* in the year 1700, and afterwards they both died, leaving issue *George Rook* their only son. *Frances* the younger daughter in 1705 married *Edward Ash* and is now living. *Mary* the

1744.

MARTIN
dem. TRE-
CONWELL
against
STRACHAN;
in Error.

1744
 MARTIN
 dem. TREGONWELL
 against
 STRACHAN;
 in Error.

widow of *Francis Luttrell* on the 1st of *January* 1701 married Sir *Jacob Bancks*, and had issue by him two sons *John* and *Jacob*, and in 1703 died seised. On her death *John Bancks* the eldest son entered and was seised, and in 1725 he died without issue; whereupon *Jacob* his only brother entered and was seised according to the settlement &c; and being so seised in *Michaelmas* term 1725 he suffered a common recovery and declared the uses to himself in fee, and afterwards in *February* 1737 he died seised without issue. The lessor of the plaintiff was great grandson and heir to *Thomas Tregonwell* (who was the second son of the first *John Tregonwell*) and likewise heir ex parte maternâ to the said *Jacob Bancks*. The defendant *Strachan* was heir to the said *Jacob Bancks* ex parte paternâ.

Upon this special verdict the Court of King's Bench (a) gave judgment for the defendants, upon which a writ of error was brought in the House of Lords (b).

After this case had been argued at the bar of the House of Lords, the following question was proposed to the Judges for their opinion,

Whether upon the death of *Jacob Bancks* the estate in question descended to his heir on the part of the mother or not?

The opinion of the Judges was now delivered, as follows, by *Willes*, Lord Chief Justice, *B. C.* " Though this is a very short question, it is a question of very great importance, as the determination of it one way or other may affect a great many families in this kingdom, and I do not know that it has ever been yet judicially determined. Though therefore we are all agreed, your Lordships will (I presume) expect in a case of such great consequence that I should not only give you our opinion, but likewise the reasons on which it is founded.

In order to determine this question it will be necessary to consider two things,

1st, What estate *Jacob Bancks* had at the time when he suffered the recovery?

2dly, What estate he gained by suffering this recovery, or in other words what was the operation of this recovery?

(a) Vid. 2 *Str.* 1179: but more fully stated in 5 *D. & E.* 107. n.

(b) The report of this case in 1 *Wils.*

66, though very confused, appears to be an account of what passed in the House of Lords.

At the time of suffering this recovery *Jacob Bancks* was seised of an estate-tail, with a remainder to *G. Rook* and *Frances Ash* in tail, and the reversion to himself in fee; and this by virtue of the settlement made by *John Tregonwell* on the 3d of June 1680 on the marriage of his eldest daughter with *Francis Luttrell*, he having two daughters and no son. By that settlement the premises in question were settled on *John Tregonwell* the grantor for life, then to the use of *Francis Luttrell* for life, remainder to *Mary* his daughter for life, remainder to her first and every other sons by *Francis Luttrell* in tail male; remainder to her first and every other sons by any other husband in tail male; remainder to her daughters by *Francis Luttrell* in tail general, remainder to her daughters by any other husband in tail general; remainder to the heirs of *John* the grantor. I omit all the other limitations, because they were all at an end before the recovery was suffered, and therefore are quite immaterial. *Mary* by *Francis Luttrell* had a son, who died an infant, and two daughters *Mary* and *Frances*. *G. Rook* is the son of *Mary* the daughter; and *Frances* the other daughter married *E. Ash*; and they were both living at the time of the recovery, and *Frances Ash* is found by the special verdict to be still living. *Jacob Bancks*, who suffered the recovery, was son and heir of the said *Mary* the daughter of *John Tregonwell* by her second husband Sir *Jacob Bancks*. So it is plain that at the time of the recovery he was seised of an estate tail by purchase under the settlement, and of a reversion in fee by descent as heir to his mother who was heir of the grantor.

As I say that he was seised of an estate-tail by purchase, it will be proper to explain to your lordships what is the signification of the word "purchase" in a legal sense; for though in common parlance no one is said to be a purchaser unless he buy an estate, the sense which the law puts on the word is quite otherwise; and it is made use of in contradistinction to "descent;" and in this sense every one is said to take by purchase who does not take by descent. If therefore a man make a voluntary grant to another, or devise an estate to another, or model his own estate so by a conveyance that he gives himself a new use or estate, the grantee, devisee, and the person who has gained such a new estate, are all said to take by purchase.

No

1744.

MARTIN
dem. TRE-
GONWELL
against
STRACHAN;
in Error.

1744.

MARTIN
dem. TRE-
GONWELL
against
STRACHAN;
in Error.

No man by law is said to take by descent unless he claim as heir to a person in whom the inheritance was vested; for a man may claim as heir to another, and yet take by purchase. As for example; if a man grant an estate to *A.* for life, with remainder to the heirs of *B.*, to whom he grants nothing, the heirs of *B.* in that case will take by purchase, and not by descent, because *B.* had no estate in him; and in common sense as well as at law it cannot be said that any thing descends to an heir from one who had nothing in it himself. Now the rule of law that an estate shall go to the heir on the part of the mother holds only in such cases where the land descends to one from his mother; for if he take by purchase, it shall always go in the first place to his heirs on the part of the father, they being considered as the most worthy.

From what I have said it appears plainly that *Jacob Bancks*, who claimed as the *son* of his mother under the settlement, (which is a name of purchase) and not as *heir* of his mother, took the estate-tail by purchase and not by descent. If indeed the estate had been limited by settlement to the heirs of the body of *Mary*, it had been otherwise; and in that case *Jacob* had had the estate tail by descent from his mother, and then there would have been an end of the question, as he would have had both his estates by descent. The case likewise would have been as plain on the other side, if the estate had not been limited to *John* the grantor for life; for if not, though *Jacob Bancks* had claimed the reversion as his heir, he would have had that likewise by purchase. But his having an estate-tail by purchase and the reversion in fee by descent is what creates the dispute. I have said (I think) enough upon this first point, considering that the counsel did not differ as to this; and I should not have said so much, but that setting this matter in a clear light will contribute very much towards the explanation of the second point, concerning which the dispute principally arises.

In order to determine the second point concerning the operation of this recovery, it will be proper in the first place to consider a little the nature of these common recoveries; and I shall consider them only as common assurances and not at all as real

transactions, being of opinion that all the confusion which has arisen concerning these recoveries has been occasioned by resembling a common recovery to another recovery, by considering it as a real transaction, and by endeavouring to give the reasons for its operating in the manner that it now does. The most learned men that we have had have split upon this rock; for they never could have said so many absurd things, had they not endeavoured to explain a thing in its nature inexplicable. I beg leave to mention some of them in order to lay them out of the way, both because they were mentioned at the bar, and likewise as a reason for my considering common recoveries quite in another light.

When this method of common recoveries was first invented, a plausible reason was given for them, (for it was necessary at first to give some reason) that no injury was done either to the heir in tail or the remainder-man, because they would both have satisfaction out of the estate which was recovered by the vouchee, according to what is said in *Co. Lit.* (which is undoubtedly law) that if a man lose his land and recover other land in value against the vouchee, it shall go to the same uses as the land which he lost, for the recompence shall follow the loss. But it was soon found that this notion would not do, for many remainders were to be barred by common recoveries that would have no advantage of the recompence, and therefore it was soon holden that the recompence in value was only the reason of barring the issue in tail but not the reason of barring those in remainder. And as this recompence in value is but mere fiction, (for in truth there is no recompence at all,) and as these common recoveries are now become the common assurances of the nation, and almost every man's estate in the kingdom now depends upon the validity of them, the Judges in modern times have frequently ventured to go further and say (as is expressly said in the case of *Hudson and Benson* (a) which I shall mention more particularly by and by) that the reason of the operation of common recoveries is not the recompence in value, but because they are common assurances. And it was found necessary to say so by reason of an ancient case *2 Rol. Abr.* 394. (b), where tenant in tail levied a fine with proclamations, and afterwards suffered a

1744.
MARTIN
dem. TRE-
GONWELL
against
STRACHAN;
in Error.

(a) 2 Lev. 38; and 1 Mod. 108.

(b) 2 Rol. Abr. (B), pl. 1.

1744.

MARTIN
 dep. TRE-
 GONWELL
 against
 STRACHAN;
 in Error.

common recovery, and it was holden that it barred the remainders, and yet in that case and many others which have since happened the issue in tail could have no recompence, because the estate-tail was destroyed by the fine before the recovery suffered.

As this notion of a recompence would not do, many others have been invented. By some it has been said (as was said at the bar in this case) that this is a privilege inseparably annexed to an estate-tail; to prove which they have gone as far back as before the statute de donis (a), to shew that these estates before the statute were conditional fees and alienable as soon as the party had issue; but I think this a very absurd notion. For as the statute was plainly made to make estates-tail absolutely unalienable, it is a strange construction on this statute to say that a power to alien by a common recovery was a privilege annexed to an estate which was intended by that statute to be absolutely unalienable.

Others have said (and so likewise it was said by the counsel here) that a common recovery was an exception out of the statute; a notion as ill founded as the other; for the statute expressly recites the mischief which it intended to remedy, which was, that the will of the donor had not been observed, but that after issue born the tenants in tail had aliened expressly against the will of the donor; and therefore it enacts that the will of the donor for the future shall be observed, and that the tenant in tail non habeat potestatem alienandi. There is no exception mentioned in the statutes, and to imply one is to repeal the statute, and to overturn the whole intent and purport of it.

Others have said that the fee gained by the recovery is but a continuance, enlargement, or extension, of the estate-tail. Now considering it as a common conveyance, there is plainly nothing at all in that; for the estate, being conveyed away, cannot be said to be continued, enlarged, or extended. And considering it as a real transaction, it is still worse; for if it be a real transaction, the estate-tail is adjudged to be void ab initio, as made by one who had no title. And what can be more absurd than to say that an estate, which is adjudged to have been void ab

(a) *Westm. 2. 13 Ed. 1. st. 1. c. 1.*

initio, is extended or enlarged by such judgment. And upon this occasion I cannot help taking notice of two passages in Mr. *Pigot's Book of Recoveries*; one in page 18, and another in page 21. In page 18 he says that there is a difference between a fine and a common recovery; "for a fine proves a right in him who levies it, but a common recovery disapproves and disaffirms all right and title in him against whom it is had;" for it is founded on a supposition that he who made the entail had no title; and yet in page 21 he says (which is most true) that he who comes in under a common recovery is subject to all the charges of tenant in tail, which, if his former position were true, is irreconcilable with reason and justice. I do not mention this to reflect on Mr. *Pigot*, for he was certainly a very learned man in this part of the law, and a very good conveyancer. But I mention it only to shew that when the greatest men endeavour to maintain points which are not maintainable, and to give reasons for things which are not founded on reason, they will necessarily be forced to talk inconsistently. And Mr. *Pigot* has himself admitted this in page 37 of the same book, where he says very truly of these recoveries (and I cannot express myself in better words) that the reasons given for the operation of recoveries favour of a wonderful subtilty, and are but apices juris, and if now agitated again would not be easily admitted: but courts of law now use all methods to support them, as they are now the common conveyances of estates. And Lord *Coke* very truly says to the same purpose in *Dormer's case* 5 Co. 40. that a common recovery is not to be resembled to a recovery in any other real action, but it is by consent and in nature of a common conveyance or assurance of lands.

I hope I have said enough to justify me in not considering a common recovery at all as a real transaction; and in the definition which I am going to give of it and to which I shall adhere I shall not regard it at all as such; *That a common recovery is a conveyance on record, invented to give a tenant in tail an absolute power to dispose of his estate, as if he were tenant in fee-simple.* This definition will, I think, tally with all the resolutions that have been made concerning common recoveries, and will solve most of the difficulties that have been raised.

1744.

MARTIN
dem. TRE-
GONWELLagainst
STRACHAN;
in Error.

1744.

MARTIN
dem. Tre.
GONWELL,
against
STRACHAN;
in Error.

But to explain this a little further—I beg your Lordship's patience a moment longer, to give you an account of the true origin and nature of these recoveries. As I said before, entailed estates by the statute de Donis (made 13 E. 1.) were made unalienable, and neither the issue nor the remainder-men could be barred, and this was at first considered as a very wise provision, and great encomiums were made upon this statute. But it was found by experience in a very little time that this statute had produced very great inconveniences; inconveniences to the crown, inconveniences to the public, and to many private persons;

To the crown, as it prevented forfeitures, and greatly increased the power of the barons;

To the public, as it was prejudicial to trade and commerce to have estates always continue in the same families, without even a power of raising money upon them;

And to private persons, to have their estates so fettered that they could not make provision for younger children, nor raise money on their estates, though their necessities were never so great.

For these reasons not long after the statute, and as it has been said as early as the time of *Edw. 3.*, men were looking about to see how to evade or at least to enervate this statute. But though some will have it that common recoveries were invented in his reign, there does not seem to be any solemn determination in their favour till the 12 *Edw. 4.*; when *Edward* the Fourth a wise prince, being sensible of the inconveniences arising from this statute, resolved if possible to break through it. To repeal it absolutely was impracticable, it was so much a favorite of those times; and to endeavour to alter it by parliament might be attended with ill consequences; he thought it therefore most advisable to proceed in a judicial way, and accordingly brought on (as it is said) *Taltarum's* case (a) before the Judges, that the authority of these common recoveries might receive a judicial determination; and the Judges, who in all ages have set their faces against perpetuities as destructive of the welfare of the nation, were easily brought to concur in such a judgment as was desired. At first, as I have said al-

(a) 12 *Ed. 4.* 14 & 19; *Hardr.* 209.

ready, these recoveries were endeavoured to be supported by legal reasons, but in tract of time they gained strength and authority by their expedience, and at length being taken notice of and in some degree confirmed by several acts of parliament they grew up into what they now are, and having been in use for so many hundred years and having become the common assurances of the nation, their authority cannot be now called in question, without overturning most of the estates in the kingdom.

It is ridiculous therefore to give any legal reasons (a) for them, since they subsist now upon usage and expedience, and as such only I shall consider them, and shall come directly to the point in question; which is the operation of this recovery.

A great many cases were cited on both sides, but none of them in point; and I think there were but six at all material to be considered in the present case; three of them were cited on the part of the plaintiff, two on the part of the defendant, the other was insisted on as an authority by both.

The first case insisted on by the plaintiff was the case of *Goldbold v. Freestone*, 3 Lev. 406. A man seised in fee of lands descended to him from his mother makes a feoffment to the use of himself for life, remainder to the heirs of his body, remainder to his right heirs; and held that the remainder should go to his heirs ex parte maternâ, for that it was part of the ancient use: but this case differs from the present in two very material circumstances; first, the conveyance was by feoffment (b), which has a very different operation from a recovery: but the most material difference is that he who made the feoffment had an estate in fee by descent from his mother, so he had no other estate in him but what came from his mother. The next case cited for the plaintiff was the case of *Abbot and Burton*, 2 Salk. 590; *Comyns*, 160 (c). A man seised in fee of lands descended to him on the part of his mother suffered a reco-

(a) Vid. 1 Bl. Rep. 254.

(b) If A., being seised in fee by descent ex parte maternâ, enfeoff B., and then B. re-enfeoff A. and his heirs, the line of descent is broken, and the heirs ex parte paternâ will take. *Co. Lit.* 12. b; *Price v. Langford*, 1 Show. 93; *Salk* 337; and *Cartb.* 441.—So if A., seised in fee of co-

pyhold lands of inheritance by descent ex parte maternâ, surrender to B. in fee (a mortgagee) who on payment of principal and interest surrenders again to A. and his heirs, the estate will descend to A.'s paternal heirs. *Doe d. Harman & Wife v. Morgan*, 7 D. & E. 103.

(c) 11 Mod. 181. S. C.

1744.

MARTIN
dem. TRE-
GONWELL
against
STRACHAN;
in Error.

1744.
 MARTIN
 dem. TRE-
 GONWELL
 against
 STRACHAN;
 in Error.

very and declared the uses to himself for life, then to several other persons in tail, with the last remainder to his own right heirs; and it was holden that the last remainder would go to his heirs on the part of the mother which was the ancient use. This indeed is the case of a recovery, but it differs likewise from the present in the most material circumstance. For there the whole estate came to the person who suffered the recovery by descent from his mother, whereas in the present case nothing came to *Jacob Banks* as heir to his mother, but a reversion after an estate-tail, which is in law considered of little or no value, as it can be barred by the tenant in tail whenever he pleases. Nothing therefore was determined in that case which was in anywise material to the present, only that it was there holden that it was exactly the same thing whether the use is declared to a man by express words and whether it results by implication; for *expressio eorum quæ tacitè insunt nihil operatur*. I mention this because it is now undoubtedly law (a), though it was formerly held otherwise, as appears from the case of *Caunden and Clerke*, *Hob.* 31. The third case insisted on by the plaintiff was the case of *Symonds and Cudmore*, *Cartbrow* 257. and 1 *Salk.* 338. Tenant in tail, with reversion to himself in fee, made a lease for 99 years, and a fine was levied by his issue; and it was holden that it did not bar the term, because it issued out of the reversion in fee as well as the estate-tail. This was strongly insisted on as an authority for the plaintiff: but we think it none, because the conveyance there was by fine, which, if the grantor had been only tenant in tail, would have conveyed only a base fee determinable on his want of issue, and then the reversion would have taken place; and therefore to give the conusee a complete estate in fee-simple, it was necessary that an interest should pass out of the reversion; and as he took an absolute estate in fee by the fine as a grant of the reversion, the base fee was merged in that; and as the fee therefore in that case arose out of the reversion, it was but reasonable that it should be charged with the grant of him from whom the reversionary interest came. But in the present case the recovery by the tenant in tail passes an absolute fee, and no interest passes to the recoveror out of the reversion in fee, (as I shall shew more fully by and by); so there is a manifest difference between these two cases. But I presume upon the authority of this case it was said by the counsel for the plaintiff

(a) See also *Harris v. The Bishop of Lincoln*, 2 P. Wms. 138.

that

that in the case of a fine (b) by tenant in tail with remainder to himself in fee, if he declare the uses to himself and his heirs, it shall go to the same heirs as he was seised of the reversion before. But there was no case cited to support this assertion; and when the case exists I shall doubt very much whether the law be so or not. But if that were so, from what I have already said in relation to the case of *Symonds* and *Cudmore* it would be no authority in the present case, because there is a great difference between the operation of a fine and a recovery. These were the only material cases which were mentioned on the part of the plaintiff.

1744.
MARTIN
dem. TRELL
GONWELL
against
STRACHAN;
in Error.

The first which was cited on the part of the defendant was *Capel's* case, 1 Co. 61. There a tenant in tail, with remainder to B. in tail, with several remainders over, suffered a common recovery; and held that it barred a rent-charge granted by B. the remainder-man in tail; and for this plain reason, because it barred the estate out of which the rent-charge was granted. So the point there in question had no relation to the present, but what was chiefly insisted on from the authority of this case was what is said at the latter end of it, that a recovery not only barred the charges of him in the remainder in tail but likewise of him in the reversion for the same reason. But as the tenant in tail in that case had not the reversion in fee in himself, these words though said generally must be construed secundum subjectam materiam; and as it does not appear that the Judges there had this case at all in contemplation, it is a strained construction to apply it to the present case, where the reversion in fee is in the person who suffered the recovery.

It was asked indeed by the counsel for the defendants, where is the difference between the two cases, when the reversion in fee is in another, and when it is in the tenant in tail? and though this question was repeated several times by the counsel for the defendants, I do not remember that the counsel for the plaintiff gave it any answer. But I think there are two plain differences. As first, in the one case, there is no ancient use in the tenant in tail on the part of the mother; secondly, the reversion is certainly barred in the one case, in the other it as certainly is not,

(b) Vid. 5 D. & E. 108, 9.

1744.

MARTIN
dem. TRE-
GONWELL
against
STRACHAN;
in Error.

for no man can bar his own estate. But I shall shew by and by that neither of these differences make any alteration in the present case. The next case cited on the part of the defendants, and which was principally relied on, was the case of *Hudson and Benson*, 2 *Lev.* 28. and 1 *Mod.* 108. *A.* seised in fee-simple made a feoffment to the use of himself and the heirs male of his body, remainder in tail to others, remainder to his own right heirs; with a proviso that if there should be a failure of issue male of his body, another person should have a rent-charge of 200*l.* a-year for ten years out of the rents and profits of the estate: his issue male after his death suffered a common recovery; and held that it barred the rent-charge, because it barred the estates chargeable with it; and this general assertion seems to imply that the reversion in fee which was in the person suffering the recovery was barred: but it is not expressly said so; and therefore though the expression is general, the reversion in fee does not seem to have been considered at all in this case. It does not therefore weigh with me so much in the determination of the present case as it does with some of my Brothers. The case of Lord *Derwentwater* (a), which was appealed to on both sides, is I think an authority for neither, but quite immaterial in the present case; for all that was determined in that case was, that the word *purchase* in the statute 11 and 12 *W.* 3. (which was a very penal law) ought not to be construed in its most extensive sense, but in the sense in which it is commonly understood, as where a man buys an estate of another. I have taken notice of all these cases, because they were cited at the bar, rather to lay them out of the way than to lay any great stress upon them in the present case, which I think may be determined upon its own reason without the aid of any of those authorities.

I shall now mention very briefly what are the reasons which induce us to be of opinion that the estate in question will not go to the heirs on the part of the mother; for in that opinion we all concur. And there are two plain reasons;

First, Because the use which is contended for by the plaintiff is not the ancient use;

Secondly, Because the new use plainly arises out of the estate-tail, and not out of the reversion in fee.

(a) 9 *Mod.* 172; and 1 *Str.* 267.

If no such use as is insisted on by the plaintiff were existing at the time of the recovery suffered, all the arguments for the plaintiff fall to the ground at once; and I think that there plainly was not. The use that then existed was only a reversionary use, which if the recovery had not been suffered could never have come in possession till there was a default of issue both in the tenant in tail and the remainder-men. But the use which is now contended for by the plaintiff is an use to take place in possession immediately before there is a default of issue of the remainder-men; for *Francis Ash* is found to be still living; and it is therefore a new and quite different use from that which existed at the time of the recovery; and this is so plain, that I need go no further.

But as the other reason was chiefly relied on by the counsel for the defendants, I will say a little likewise as to that. In what manner this recovery operated on the reversion in fee may admit of some doubt. It was insisted that the recovery barred it; but I cannot think that it did, for a man cannot be properly said to bar his own estate. But whether it barred destroyed or conveyed it, I think it amounts to just the same thing. For either it remained in the recoveree after the recovery suffered, or was destroyed by it, or was conveyed to the recoveror; and in either case the consequence will be just the same. If it were destroyed, the use must be destroyed likewise. If it were conveyed to the recoveror, he took nothing by such conveyance, because he had a fee-simple without it by the recovery suffered by the tenant in tail; and there cannot be a fee upon a fee. If it remained in the recoveree, it was annihilated immediately for the same reason; because he as tenant in tail having conveyed a fee to the recoveror, for the reasons just before mentioned, it must be annihilated, because there cannot be two fees in two persons at the same time. For my own part, I choose rather to consider it as a conveyance of the reversion, and think that it must operate as two grants; and then *Jacob Bancks* having granted a fee as tenant in tail (as he certainly did) to the recoveror, the grant of the reversion comes too late, because he had a fee before, and that the same grant may operate as two made at different times to prevent inconsistencies. I shall mention one case out of *Co. Lit.* 302. b. and

1744.

MARTIN
dem. TRE-
CONWELL
against
STRACHAN;
in Error.

1744.

MARTIN
dem. TRE-
GONWELL,
against
STRACHAN;
in Error.

might mention many others. Tenant for life and he in the reversion in fee join in a feoffment: it shall be considered as the surrender of the tenant for life to him in the reversion, and then as the feoffment of him in the reversion after such surrender; otherwise the grant could not take place according to the intent of the parties. But I will not insist upon niceties, since whichever way the recovery operates, it is plain from what I have said that the new use arises entirely out of the estate-tail, and not at all out of the reversion in fee.

Many things were said by the counsel of the hardships and inconveniences arising in this case; of the hardships by the counsel for the plaintiff, and of the inconveniences by the counsel for the defendants. As for the hardships, they have no weight with me for two plain reasons; first, because your Lordships, when sitting in judgment upon a writ of error, must have no regard to the hardship of a case, but must determine according to law. If there be a hardship in the law, the Legislature must be applied to, but a Court of Law must judge as the law now stands. Secondly, The opinion we are now of in the present case will be attended with no hardship at all. The hardship complained of is, that the estate which came from the mother will go to persons who are quite strangers in blood. Now if it go to the plaintiff, it will go to a person who is not heir to the mother, which is equally hard; for *Frances Asb* her daughter who is still living is her heir at law, and must have taken as such if the mother had been last seised. But as the rule of law is that an heir must claim from the person who was last seised, and as *Frances* was only of the half-blood to *Jacob Bancks*, though of the whole blood to her mother, she cannot by law take as heir to *Jacob*. So be your Lordships' determination one way or the other the hardship will be the same, and the next of the blood of the mother will be disinherited. As to the inconveniences insisted on by the defendants, that a determination for the plaintiff might affect a great many estates in this kingdom by letting in the charges of the ancestors on the part of the mother, whereas recoveries have been always taken to clear an estate from all incumbrances; this is a very great consideration and was of great weight with my Brothers. For though it was truly said that
this

this inconvenience may be prevented for the future by a man's declaring the uses to the heirs on the part of his father, and by many other methods, yet how this may affect recoveries which have been already suffered, and how many persons may be in the same circumstances, it is very difficult to say. The only doubt which I have in relation to this matter is this (for otherwise I entirely agree with my Brothers) whether we being now upon a special verdict can take notice of any facts which are not particularly found; for if Judges were at liberty to suppose inconveniences which do not appear in the special verdict, and which may or may not exist, I am afraid that judgments would sometimes be given upon too slight presumptions, and every judge would be left too much to his own private conjectures. However I submit this to your Lordships, but think that the case may be determined without having recourse to this argument.

For what I rely upon is that the use, under which the plaintiff would entitle himself, is not the ancient use, which descended to *Jacob Bancks* as heir on the part of his mother, both because no such use existed at the time of the recovery, and also because the use which was declared arose entirely out of the estate-tail.

For these reasons we are of opinion that the estate in question upon the death of *Jacob Bancks* did not by law descend to his heir on the part of the mother (a)."

And the judgment was affirmed.

(a) See *Roe d. Crow v. Baldwre* and others, 5 *Durnf. & E.* 104., where this case was cited and relied upon, and its doctrine applied to copyhold lands.

ANONYMOUS.

"A Person arrested on a *Sunday* on an attachment for a contempt (for a rescue) moved to be discharged; and the counsel for the person in custody insisted on the statute 29 *Car. 2. c. 7. f. 6.* and also on *Prinfor's* case, *Cro. Car.* 602., which case was nothing to the purpose, for there the arrest was held to be wrong because it was an arrest by a process from the Court of Sessions after a certiorari to remove the proceedings,

1744.

MARTIN
dem. TRE-
CONWELL
against
STRACHAN;
in Error.

E. 17 G. 2.
Tuesday,
April 24th.

A person
may be ar-
rested on a
Sunday on an
attachment
for a rescue.

1744.
ANONYMOUS.

and this likewise was before the stat. 29 *Car.* 2. The words of the statute are "that no person shall serve or execute any writ process &c on the Lord's day, except in cases of treason felony or breach of the peace; but that the service of every such writ &c shall be void to all intents and purposes."

And we held that a contempt of this Court was a breach of the peace, and therefore denied the motion (a). The attachment was for a rescue which is certainly a great breach of the peace."

(a) So a person may be arrested on a Sunday under an escape warrant; Sir *W. Moore's* case, 2 *Lord Raym.* 1028; or if he has wrongfully escaped, he may be retaken on a Sunday without a warrant; *ib.* and *Atkinson v. Jameson*, 5 *D. & E.* 25; and *Featherstonehaugh v. Atkinson*, *Barnes* 373. But bail cannot take the defendant on a Sunday in order to surrender him.

Brookes v. Warren, 2 *Bl. Rep.* 1273; nor can a defendant, who has been convicted on a penal statute, be arrested on a Sunday for nonpayment of the penalty. *R. v. Myers*, 1 *D. & E.* 265. Nor can a rule nisi for an attachment for nonpayment of a sum of money pursuant to the Master's allocatur be served on a Sunday. *M^r Ilham v. Smith*, 8 *D. & E.* 86.

17 Geo. 2.
Wednesday,
April 25th.

BARKER Assignee of the Sheriff of BERKS against HORTON.

It not appearing in a declaration by the assignee of a replevin bond that the plaintiff was the avowant or person making cognizance, the court of themselves referred to the replevin suit, it being of record in this court, and this declaration concluding prout patet per recordum &c.

"THIS was an action of debt brought by the plaintiff, as an assignee of a replevin bond, by virtue of the statute 11 *Geo.* 2. c. 19. And there being no one for the defendant, who put in a general demurrer to the declaration, and *Belfield* praying judgment for the plaintiff, we were just going to give judgment accordingly, when Mr. J. *Burnett* started an objection that the act of parliament only authorised the sheriff to make an assignment to the avowant or person making cognizance in a replevin, and that it did not appear from so much of the pleadings in the replevin as are set forth in this declaration that the plaintiff in this cause either avowed or made cognizance, and he might plead some other plea, and then would not be entitled to an assignment (a). He is indeed called the avowant in replevin at

(a) But if the plaintiff in replevin do not appear in the county court and prosecute according to the condition of the replevin bond, the defendant is entitled to an assignment of the bond. *Dias v. Free-*

man, 5 *D. & E.* 195; in which case it was also ruled that the assignee of a replevin bond may sue in the superior courts though the replevin be not removed out of the county court.

the beginning of the record. But my Brother *Burnett* thought that not sufficient.

But upon reading over the record, I observed that after the declaration has set forth the account of the proceedings in the replevin cause, it concludes in this manner; "As by the record of the judgment remaining in this court amongst other things more fully it doth appear." And it being a record of our court, I thought that we were obliged to take notice of it, and therefore sent for the roll, by which it appeared that the present plaintiff put in an avowry in the replevin cause. With this my Brother *Burnett* was satisfied; and we gave judgment for the plaintiff."

Sir HUGH SMITHSON Assignee of a Sheriff *against*
THOMAS SMITH an Attorney.

"MOTION was made by *Prime* to stay proceedings on the bail-bond, bail being regularly put in in the original cause before the assignment of the bail-bond; rule nisi; and now *Willes* and *Booth* shew cause against the rule.

The original action was brought against *William Smith* clerk, who put in bail in the following manner; the condition of the recognizance of bail was that if judgment should be given against *William Smith* gentleman, who was arrested by the name of *William Smith* clerk, in the said plea of trespass on the case, then the said *William Smith* gentleman, who was arrested by the name of *William Smith* clerk, should satisfy all the damages which to the said Sir *Hugh Smithson* against the said *William Smith* gentleman, who was arrested by the name of *William Smith* clerk, should be adjudged, or render his body &c.

And it was objected by the counsel for the plaintiff; 1st, That the rule was made in a wrong cause, for that it ought to have been made in the original cause; 2dly, That the defendant has not put in any bail; for that he ought to put in bail with the same addition by which he was sued, so that this bail must be taken to be put in for another person and not for the defendant.

6 B

3dly,

1744.

BARKER
against
HOATON.E. 17 Geo. 2.
Wednesday,
April 25th.

If a rule be moved for to stay the proceedings on a bail-bond it must not be intitled in the original cause, but in the action on the bail-bond. — If a defendant, who is arrested by a wrong addition to his name, put in bail thus, *A. B. gent.* who was arrested by the name of *A. B. clerk*, he is not thereby estopped to plead in abatement to the original action that he was sued by the wrong addition. Whether he is estopped to plead this in abatement in an action on the bail-bond? Qu.
Barnes 94.
S. C.

1744-
SMITHSON
against
SMITH.

3dly, That the Court need not interpose in this summary way, but that the defendant in this cause may plead *comperuit ad diem* if the bail were rightly put in. 4thly, That the plea put in by the defendant in the original cause in abatement could not be allowed, because he entered into the bail-bond by the name of *W. Smith* clerk (as was admitted), and therefore was estopped to say that this was not a right addition. And the counsel cited 1 *Salk.* 7., and 6 *Mod.* 225; 311: but they were nothing to the purpose.

And we were of opinion against the plaintiff in omnibus. For 1st, The rule was in the right cause. If it had been made in the original cause it had been wrong, not being to stay any thing in that cause but to stay the proceedings in the action brought on the bail-bond.

2dly, We were of opinion that the bail was rightly put in; and the officers of the court all certified that this was the usual form in these cases. And if the defendant were to put in bail otherwise, (and as the plaintiff would have him) he would be deprived of his plea in abatement because he would certainly be estopped (a).

3dly, We would not oblige the party to plead *comperuit ad diem* in so plain a case, which would be only to occasion delay and expence; to prevent which these sort of motions have been always allowed.

4thly, Upon this motion we have nothing to do with the plea in abatement in the original cause, but the plaintiff may demur to it if he please: but we gave him no encouragement, because we declared our present opinion to be that he could not be estopped by the bail-bond in this cause, though perhaps he

(a) If the defendant omit to plead a misnomer, he may be taken in execution by the wrong name; *Crawford v. Satchwell*, 2 *Str.* 1218. But if an officer under a *distringas* against *C. B.* to compel an appearance take the goods of *A. B.*, he cannot justify it in trespass brought by *A. B.*, though he aver that *A. B.* and *C. B.* are the same person, unless *A. B.* appeared to the first action and omitted to plead the misnomer in abatement. *Cole v. Hindson*, 6 *Durnf. & East* 234.

might,

might, if he were to plead in abatement in an action brought on the bail-bond (a).

1744.

SMITHSON
against
SMITH.

We therefore made the rule absolute, and with costs."

(a) Vid. *Evans v. King*, E. 18 Geo. 2. post, and the cases there cited. A plea in abatement of misnomer of the defendant beginning "And the said Richard

sued by the name of *Robert*" is bad, because the defendant thereby admits himself to be the person sued. *Roberts v. Moon*, 5 Durnf. & East 487.

KENWARD against KNOWLES.

E. 17 Geo. 2.
Tuesday,
May 1st.

THIS came before the Court on a case reserved at the *Surry* assizes. To trespass for breaking and entering the plaintiff's house and taking his goods the defendant pleaded not guilty; and at the trial justified under the stat. 10. Geo. 2. c. 18. for rebuilding the parish church of *St. Olave* in *Southwark* and *London* by a distress for nonpayment of a penalty of 10*l.* forfeited by the plaintiff for refusing to take upon him the duty or office of one of the collectors of the rates and duties for rebuilding the church under that act (b).

A Baptist preacher qualified according to stat. 1 W. and M. c. 18. is exempted from serving all parish offices, whether they existed before or were created since that act, even tho' he be also engaged in trade.

It appeared that the plaintiff for several years before had been and was at the time of being nominated one of the collectors a merchant or dealer in hops and a substantial inhabitant and parishioner of *St. Olave*; and was also a minister preacher or teacher of a congregation of protestant dissenters, who scruple the baptising of infants, commonly called Baptists. The congregation or place of meeting was duly certified and registered as required by the toleration act, 1 W. and M. c. 18. (c); according

(b) By 10 Geo. 2. c. 18. s. 2. certain rates and duties are to be paid. By sect. 5. six collectors are to be annually chosen at a vestry from among the substantial inhabitants of the parish. By sect. 7. a penalty of 10*l.* is inflicted on any person, chosen a collector, for neglecting or refusing to execute such duty or office. And by sect. 8. persons, who have served the office of collector, are exempted from serving the office of scavenger for the parish.

(c) The eleventh section of which en-

acts "that every teacher or preacher in holy orders or pretended holy orders, that is a minister preacher or teacher of a congregation, that shall take the oaths herein required, and make and subscribe the declaration aforesaid, and also subscribe &c, shall be thenceforth exempted from serving upon any jury, or from being chosen or appointed to bear the office of churchwarden, overseer of the poor, or any other parochial or ward office, or other office in any hundred of any shire city town parish division or wapentake."

1744.
KENWARD
against
KNOWLES.

to the directions of which act the plaintiff had duly qualified himself as a Baptist teacher or preacher. It was also proved that ever since the toleration act it had been usual for Baptist ministers in many instances to carry on secular business or employment. The question reserved was whether the plaintiff as such minister was exempt from serving the duty or office of collector.

After argument by *Wynne* Serjt. for the plaintiff, and *Skinner* Serjt. for the defendant,

The Court gave judgment for the plaintiff (a).

(a) The following account of this case is taken from Mr. J. Abney's MS.

"*Per Curiam*. This is an extremely clear case. The case was not reserved from any doubt in the Judge who tried the cause, but from the importunity of counsel. The toleration act is grounded on natural rights, and the highest natural right is that of the conscience. The statute ought to receive a large and beneficial exposition, if the case wanted it: but the present is not only within the intent but also within the very letter of it. Every person who is in holy orders, and is a teacher qualified according to 1 *W.* and

M. c. 18, is exempted from serving any parochial office or other office in any parish &c; the plaintiff is so qualified, and therefore is exempted. This is a parochial office in the nature of it; the stat. 10 G. 2. calls it an office. It is appointed to by the parishioners, and exercised in a parish. The addition of the plaintiff's being a merchant or a dealer in hops varies not the case; it does not destroy the privilege any more than a clergyman's holding a farm or exercising any temporal office. The toleration act exempts teachers from all future (1) offices. Judgment for the plaintiff."

(1) This was said in answer to one of the defendant's arguments that the toleration act only gave an exemption from offices then in existence, and that the office in question was created by a subsequent statute.

E. 17 Geo. 2.
Wednesday,
May 2d.

TRIBE and Another Assignees of R. BURCHALL a Bankrupt against WEBBER.

Where a debtor gives bail on an arrest, and afterwards surrenders himself in discharge of his bail, and then lies in prison two months, he becomes a bankrupt from the time of his going to prison, not from the time of his arrest.

Bull. N. P. 38. 7 Vin. Abr. 64. note, S. C.

ASSUMPSIT for money had and received to the use of the assignees by the defendant, who pleaded the general issue. On the trial a verdict was given for the plaintiffs for 365 l. 18 s., subject to the opinion of this Court on the following case.

The bankrupt for many years before and at the time of his bankruptcy was a scrivener. On the 23d of June 1740 he was arrested by the sheriffs of London at the suit of the plaintiff

(Tribe)

(*Tribe*) in an action of debt on bond for 2000*l.*; and he put in special bail. On the 13th of *April* 1741 he surrendered himself to the King's Bench prison in discharge of his bail to that action and also in discharge of his bail to several other actions, and from that time he continued a prisoner there for two months and upwards. On the 3d of *April* 1742 a commission of bankrupt issued against him on the petition of the plaintiff *Tribe*, and he was declared a bankrupt, and the plaintiffs were chosen his assignees. The bankrupt being indebted to the defendant in 365*l.* 18*s.*, and *P. Meyer* being also indebted to the bankrupt in a larger sum of money, *Meyer* by the order and on the account of the bankrupt paid to the defendant the several sums following at the days hereafter mentioned,

21st <i>January</i> 1740, 1.	-	-	£. 47	0	0
22d <i>January</i> 1740, 1.	-	-	300	0	0
18th <i>August</i> 1741, when the bankrupt was a prisoner, as above	-	-	18	18	0
			£. 365	18	0

so that the two first sums paid by *Meyer* to the defendant on the bankrupt's account were paid after the bankrupt's arrest and before his surrender to prison in discharge of his bail; and the last sum was paid four months after his going to prison.

The question reserved for the opinion of the Court was whether *Burchall* was a bankrupt from the 23d of *June* 1740 when he was first arrested (*a*), or only from the 13th of *April* 1741, when he surrendered himself to prison in discharge of his bail.

This case was argued on the 7th of *February* last by *Wynne* Serjt. for the plaintiffs and *Bellfield* Serjt. for the defendant, and again on this day by *Birch* King's Serjt. for the former and

(*a*) By stat. 21 *Jac.* 1. c. 19. s. 2. it is enacted that every person who, being indebted to any person in 100*l.*, shall not pay within six months after the same shall grow due, and the debtor be arrested for the same, or within six months after an original writ sued out to recover the said debt &c, or "being arrested for debt, shall after his or her arrest lie in prison two months or more upon that or any other

arrest or detention in prison for debt," or being arrested for the sum of 100*l.* of just debt shall at any time after such arrest escape out of prison, or procure his enlargement by putting in common or hired bail, shall be adjudged a bankrupt; "and in the said cases of arrests, or lying in prison for such debt or debts, or getting forth by common or hired bail, from the time of his or her said first arrest."

1744.

TRIBE
against
WEBBER.

1744.

TRIBE
against
WEBBER.

Willes King's Serjt. for the latter. The defendant's counsel cited and relied on these three cases; *Duncomb v. Walker*; 1 *Ventr.* 370; 3 *Lev.* 57; 2 *Show.* 253; *Skin.* 22, 87. Sir T. Raym. 479; *Hill v. Shisk*, *Skin.* 270; 2 *Show.* 512; and *Cane v. Coleman*, *Salk* 109.

And now the Court gave judgment (a) in favour of the plaintiffs as to the last sum of 18 l. 18 s., and ordered the verdict to be entered up for that sum.

(a) The reasons given by the Court for the judgment do not appear in the Lord Chief Justice's note books, but the following account is taken from Mr. Justice Abney's MS.

"*Willes* Chief Justice. The words of the stat. 21 Jac. 1. are doubtful; and therefore the Court are so to expound the statute that the fewest inconveniences may arise. Though the reporters are but dark and obscure, yet all the three cases cited are with the defendant. To let the bankruptcy commence from the arrest when the imprisonment does not follow for some months or perhaps years would destroy all trade, as it would destroy all credit; and therefore if by any possible construction that can be prevented, we will certainly do it. Now the statute will admit of this construction. The words "after his or her arrest" were thrown in currente calamo, and can be of no use but to confound. "Being arrested and lying in prison two months or more" is an act of bankruptcy, and any common person would understand that the lying in prison must *instantly and immediately* follow the arrest. *Lying in prison* was intended to be explanatory of what the *arrest* meant. The plaintiffs therefore in this case will be entitled only to the 18 l. 18 s., that having been paid after the bankrupt's yielding himself to prison; which is an act of bankruptcy by the stat. 13 Eliz.

Burnet J. The words "after his or her arrest" couple the arrest with imprisonment; otherwise an imprisonment ten years after might have relation to an arrest ten years before.

Abney J. Bankruptcy in my opinion ever was and yet is considered as a crime, whatever tradesmen may now think of it. It was anciently punished with corporal punishment; the body lands and goods are at this day subject to the commissioners. Now bankruptcy is a man's own act; arrest is the act of a stranger: I cannot prevent a man's arresting me, but I can prevent imprisonment, for in less than two months I can get bail. The concurrent cases are with the defendant; and the argument ab inconvenienti is very cogent."

—But where sham bail is put in before a Judge, as a mean to get the defendant turned over to the prison of the court, and he is immediately surrendered accordingly, the imprisonment is to be computed from the time of the arrest. *Rose v. Green*, 1 *Burr.* 439.—And the property of the bankrupt vests in the assignees by relation either from the time of the arrest or from going to prison, as the case may be. *Barwell v. Ward*, 1 *Atk.* 260; *Coppendale v. Bridgen*, 2 *Burr.* 814; and *King v. Leith*, 2 *D. & E.* 141.

1744.

E. 17 G. 2.
Saturday,
May 5th.WILLIAM CRISPE *against* WILLIAM PERRITT.

THIS was a case reserved in an action of trover. The plaintiff brought his action by the direction of the Lord Chancellor against the defendant as assignee under a separate commission of bankrupt awarded against the plaintiff, dated the 2d of *February* 1742 upon the petition of the defendant, in order to try whether the plaintiff were or were not a bankrupt on or before the said 2d of *February*. Upon the trial it appeared that the plaintiff was a joint trader with two others at the time of issuing the said separate commission; that the plaintiff had committed an act of bankruptcy before the issuing thereof; that the plaintiff was jointly concerned with two others in the erection of the amphitheatre in *Ranelagh Gardens* at *Chelfea*; and that the defendant was employed by the plaintiff and his partners in doing the plasterers' work there, by reason whereof the plaintiff and his partners became jointly indebted to the defendant in the sum of 426*l.* 0*s.* 4*d.*; and the same was due and owing to the defendant before the act of bankruptcy and at the time of suing out the commission. It did not appear that there was any separate debt due from the plaintiff to the defendant on any account whatever, or that either of the other partners had committed any act of bankruptcy.

A separate commission of bankrupt may be taken out against one of several partners on the petition of a joint creditor.

1 Atk. 133.
S. C.

The question reserved for the opinion of the Court was whether a separate commission can be taken out against the plaintiff upon the petition of one who is only a joint creditor.

After two arguments at the bar, the first on the 21st of *November* 1743 by *Willes* King's Serjt. for the plaintiff, and by *Prime* King's Serjt. for the defendant, and the second by *Skinner* King's Serjt. for the former and *Wynne* Serjt. for the latter on the 3d of *February* 1743, the Court took time to consider the case; and on this day the opinion of the Court was delivered, as follows, by

Willes, Lord Chief Justice. "In order to determine this question it will be proper to consider,

1744
 CRISPE
 against
 PERRITT.

1st, What a bankrupt is;

2dly, The statutes concerning bankrupts;

3dly, Whether any light is to be got from any of the cases in the books;

4thly, Whether there be any precedents of such commissions; and

Lastly, What will be the inconveniences on the one side and on the other.

First; A bankrupt is not considered as an unfortunate person, but as one who has been guilty of a crime; and therefore in the four first statutes concerning bankrupts he is frequently called *an offender*, and in all of them he is considered as one who has endeavoured by fraud or collusion to cheat and deceive his creditors and to prevent their recovering their just and honest debts. And for this reason in all the statutes that are made concerning them, they are made liable to several very great penalties. For the same reason it is expressly said in the stat. 21 Jac. I. c. 19., which is the governing statute concerning bankrupts, that all and singular the statutes concerning them shall be in all things largely and beneficially construed and expounded for the aid help and relief of the creditors of the bankrupt; and this rule has always been adhered to by Courts of justice in the construction of all the subsequent statutes concerning bankrupts. As therefore a bankrupt must be considered as a criminal, it seems a little absurd to say that if there be two partners, and one commits a crime, he shall not be liable to be punished because the other is innocent. It would indeed be unjust to punish the innocent partner for the crime of the other: and it would be equally unjust to excuse the partner who is guilty of the crime for the sake of the other who is innocent, and this even to the prejudice of other innocent persons, as I shall shew presently that it plainly would be if a commission could not be taken out against one partner becoming a bankrupt. The nature therefore of a bankrupt seems to afford some argument in favor of what is contended for by the defendant in this case.

Secondly; I shall now see what light can be got from the particular words of any of the statutes in respect to this question. We agree with the counsel for the plaintiff that none of the statutes say any thing concerning partners except the

10 An.

10 *An. c. 15.*, and the 5 *Geo. 2. c. 30.*; and though the word *partners* is mentioned in the latter, it is quite in respect to another thing and not at all to this purpose. On the other hand, it must be agreed that the words of all the other statutes are general, and that where the words *creditors* and *debts* are mentioned in any of them, there are no words to confine or restrain them either to separate or partnership debts, but the words *creditors* and *debts* may be construed to comprehend both, and therefore ought to be construed according to the rule I have before laid down in the most large and beneficial sense for the creditors. If therefore I make it appear that it is most beneficial for the creditors to construe these words in the sense contended for by the defendant, nay that it would be depriving the creditors in many cases of the benefit intended them by these statutes to construe them in another sense, this likewise will afford another very strong argument in behalf of the defendant. I do not rely much on the stat. 10 *An. c. 15.*, though it was so much relied on by the counsel for the defendant, because the words of that statute may be satisfied only by admitting that a separate commission may be taken out against a partner upon the petition of a separate creditor, which is admitted by the counsel for the plaintiff may be done; and to be sure many such have been sued out. The words are (after stating a doubt whether the discharge of a bankrupt by virtue of an act 4 *An. c. 17.* should be construed to discharge the partners of such bankrupt from the same debt) "that by the discharge of any bankrupt by force of the said act or any other acts relating to bankrupts from the debts by him due and owing at the time that he did become a bankrupt shall not be construed nor was meant or intended to release or discharge any other person or persons who was or were partner or partners with the said bankrupt in trade at the time he became a bankrupt, or then stood jointly bound or had made any joint contract together with such bankrupt for the same debt or debts from which he was discharged as aforesaid: but that notwithstanding such discharge such partner and partners joint obligor and obligors and joint contractors with such bankrupt as aforesaid shall be and stand chargeable with and liable to pay such debt and debts and to perform such contracts as if the said bankrupt had never been discharged from the same." Now though a commission be taken out against a

1744.

CRISPE
against
PERRITT.

1744.

CRISPE
against
PERRITT.

partner on the petition of a separate creditor, it might be argued that a certificate under that commission would discharge the bankrupt both from his partnership and separate debts, both because the words of the stat. 4 & 5 *An.* are general, and likewise from the reason of the thing because a partnership creditor may come in, if he please, and receive a satisfaction under such separate commission. This might occasion a doubt, and was a great doubt in *Westminster-Hall*, and therefore was a sufficient reason for the declaration in this clause, even though a separate commission could not be taken out against one partner for a partnership debt. We therefore do not think that any thing can be inferred from this statute.

Thirdly; I will now consider the only material cases that were cited, or that I can find in any of the books; and they give but very little light in respect to the point in question. The case of *Richardson v. Goodwin*, 2 *Vern.* 293, and that *Ex parte Crowder*, *ib.* 706, only shew in what manner the effects shall be distributed, and how in case of a bankruptcy of one or both of the partners the joint and separate debts shall be paid out of the joint and separate estates. But in the first case it does not appear whether the commission were taken out against one partner upon the petition of a joint or separate creditor; and by the state of the case I should be inclined rather to think the latter. And in the other case both the partners were bankrupts, and a joint commission was taken out against them. The case *Ex parte Cook*, 2 *P. Wms.* 500, is the same as the case of *Crowder* in *Vernon*; for there likewise both the partners were bankrupts, and a joint commission was taken out, and therefore it is nothing to the present purpose. Indeed in that case there were likewise two separate commissions taken out afterwards, but Lord Chancellor *King* held that it was fruitless and vexatious, for that the separate creditors might have come in under the joint commission and have had the same advantage and relief as they could have under their separate commissions.

There are indeed three cases that seem to be in some degree material; not that they prove that such a separate commission has ever been taken out on a partnership debt, but they shew that bankruptcy has been sometimes considered as a determination

or a severing of the partnership, and that from that time the bankrupt has been considered as a separate person both in respect to the demands which he has against others and the demands which others have against him even upon the partnership account; and if so, all the arguments against the present commission fall to the ground at once. The first case of this sort is in 2 *Keb.* 750, the case of *Thomas v. Day*, where it was holden that an assignee of one partner, a bankrupt, may bring an action of trover against the other for his share of the partnership effects. The next book where the same doctrine is advanced is in 1 *Mod.* 45: but there it is only the saying of *Twifden J.*, and not any case determined by the Court. The words are "If there be two partners, and one break, you shall not charge the other with the whole debt, because it is *ex maleficio*: but if there be two partners and one die, the survivor shall be charged with the whole; and therefore a motion that one who was partner with another who was a bankrupt might, upon his being arrested, put in bail for the bankrupt as well as for himself, was denied. The last case upon this head is a case *Ex parte Smith*, reported in 1 *P. Wms.* 237: *B.* and *C.* were bound in a bond to *A.*; *B.* became a bankrupt; and it was holden by Lord Chancellor *Harcourt* that the money being lent to them both *A.* the obligee should come in as a creditor under the commission only for a moiety of the debt. To be sure the determination of Lord *Harcourt* was a right determination in equity; and in commissions of bankrupt, which are founded upon equity, the equity of the case ought principally to be considered. Whether or not the law will hold, as it is laid down in the two other cases, I will not take upon me to say, but it is highly reasonable that it should be so; and if the law were so (as I said before) there is an end of the dispute. But for the reasons which I shall give presently, I think we may venture to determine the present question without relying on the authority of these cases, and the rather since the law, however it was before, is now altered by the stat. 10 *An.* c. 15; and in case of the bankruptcy, the other partner may be sued for the whole debt at law.

Fourthly, I come now to the precedents. It was rightly said by my Brother *Willes*, as the rule is laid down by Lord *Coke*,
that

1744.

CRISPE
against
PERRITT.

1744:

CRISPE
against
PERRITT.

that where a thing has never been done, it is a strong argument that it ought never to be done (a): but it is but an argument, and is of less force in the present case than in most others, because the petitions and commissions are usually in general terms, and it very rarely appears from them whether the commission were sued out on a joint or separate debt. But it never having been determined that there may not be such a commission, as is contended for by the defendant, affords some argument for him. For it can hardly be imagined but that this case must have frequently happened, and that such commissions must have been taken out; and if they have, they have always been proceeded on and have never been set aside. To shew that there have been such commissions, and in some measure to answer this argument of want of precedents, the defendant has produced two; the one in the time of Lord *Macclesfield*, and the other in the time of Lord *Talbot*, both very great Chancellors. That in Lord *Macclesfield*'s time was a commission taken out against *H. Hewett* (b); and there it appears on the face of the petition that he and one *William Raphson* were partners, that he only became a bankrupt, and that the debt of the petitioning creditor was a joint debt owing from both of them: it was on the 10th of *February* 10 *Geo. 1.* The other was the case of *Patrick Crawford* (c), who was a partner with *John Crawford*, and against whom a separate commission was taken out in 1733. It does not appear there upon the petition that it was a joint debt: but from what was said by the counsel in their argument on a petition preferred to the Lord Chancellor concerning the allowance of the certificate and by the Lord Chancellor himself, it seems that it was obtained upon the petition of a joint creditor, and that the Lord Chancellor was of opinion that it was right. For the counsel said that a joint creditor, under pretence of being a creditor, had taken out the commission, and made it an objection to the commission; to which the Lord Chancellor said, "Where one partner becomes a bankrupt and the other not, a commission will go against him, for he owes the debt, and it is right." This case therefore is not entirely without precedents. But

(a) *Co. Lit.* 81. b.(b) *Co. Bank. L.* 17. 4th edit.(c) *Ib.*

Lastly, What we principally found our opinions upon is the reason and justice of the case. The objections against it were,

1st, That it was not a debt within the meaning of the acts, because it was not such a debt for which an action could have been brought singly against him.

2dly, That this would produce great inconvenience and confusion in marshalling the partnership effects, and that the innocent partner might be very much affected thereby.

As to the first objection; none of the acts say that it must be such a debt for which an action may be brought against him; and the stat. 7 Geo. 1. c. 31. has determined that a creditor may come in under a commission even before his debt becomes due; and the 5 Geo. 2. c. 30. even that such a person may be a petitioning creditor. A partnership debt is certainly the debt of each of the partners, and if a judgment be obtained against them, either of them or the goods of either of them may be taken in execution without the body or goods of the other: and a commission, as has been said in many cases, may be more properly compared to an execution than an action.

As to the inconveniences, they will be just the same in every respect to the other partner if a commission be taken out against one partner for a separate debt, which is admitted by both sides to be right; for there the bankrupt's share of the partnership effects must be taken and sold under the commission, only making satisfaction for the partnership debts if such creditors choose to come in under such commission, as they have generally done. But on the other hand, there would be the greatest inconvenience and a plain defect in the law if such commissions could not be sued out. Suppose the case of two partners, one an infant or a lunatic and the other a bankrupt, the creditors would be without remedy under the statutes of bankrupt if such a commission could not be sued out, for an infant or a lunatic (a) cannot be a bankrupt. Suppose two are jointly bound in a bond, one a trader and the other not, the trader becomes a bankrupt; there likewise the obligee would be without remedy under the statutes of bankrupt,

(a) In the instance of *P. Crawford*, before alluded to, his partner *John Crawford* was a lunatic, and so found on a com-

mission of lunacy three months after *P. Crawford* was declared a bankrupt.

1744.
 CRISPE
 against
 PERRITT.

if the plaintiff's doctrine were to prevail, and the offender would escape unpunished. He would not perhaps be quite without remedy at law, for he might outlaw the bankrupt: but this would be a very tedious and expensive method, whereas the statutes of bankrupt were plainly intended to give the creditors of the bankrupt relief in a cheap and expeditious way. The only answer that I can think of that can be given to any of these arguments is, that a commission may be taken out against the bankrupt by a separate creditor on his separate debt, and then his joint creditors may come in if they please under this commission and complete justice will be done. This looks plausibly; but when considered it is no answer; for many cases may happen where a partner bankrupt may have no separate creditors, or none of the value prescribed by the statutes, and then there will plainly be a defect of justice unless a commission may be taken out upon the petition of a joint creditor.

For these reasons we are of opinion that the present commission was rightly sued out. Whether or not it must appear by the petition that the bankrupt's share of the joint debt alone amounts to 100 *l.* (a), or whether the whole joint debt must be considered as the bankrupt's debt, it is not necessary now for us to determine, because there are but three partners in the present case, and as the debt proved is 426 *l.*, his third part plainly amounts to above 100 *l.* Nor do we determine at all in what manner the effects shall be marshalled upon such commission, that being the proper business of the Court of Chancery with which we have nothing to do.

All that we determine is that a separate commission may be sued out against a partner (b), who is a bankrupt, upon the petition of a joint creditor; the consequence of which is, that a verdict must be entered up for the defendant according to the rule (c)."

(a) It was only stated in the petition on which *H. Hewett* was declared a bankrupt, *sup.* 472, that the joint debt due from *H. Hewett* and his partner amounted to "100 *l.* and upwards."

(b) But a commission of bankrupt cannot be sued out against two, of three, partners: *Allen v. Downs*, *M.* 25 *Geo.* 3. *B. R.*

(c) *Vid. Fox v. Hanbury*, *Cowp.* 449.

1744.

WILLIAM BULLYTHORPE *against* ELIAS TURNER.E. 17 Geo. 2.
Monday,
May 7th.

REPLEVIN for taking the plaintiff's goods at the parish of *Saint Mary le Bow* in the ward of *Cheap* in *London*.

The defendant prayed *judgment of the declaration*, because he took the said goods and chattels in the parish of *Saint Martin Ludgate without* in the ward of *Farringdon without* in *London* in a certain dwelling-house there called the *White Swan*, without this that he took them at the parish of *Saint Mary le Bow* in the ward of *Cheap*; and this he is ready to verify, wherefore he prays *judgment of the said declaration*. And in order to have a return of the goods, he avowed taking them in the parish of *Saint Martin Ludgate without* in the said ward of *Farringdon without*, because the plaintiff before the time when &c, to wit, for three quarters of a year ending on the feast of the *Annunciation* &c 1739, and from thence continually until the time when &c, enjoyed a certain messuage &c situate in the *Strand* &c under a demise thereof to him made by the defendant at the yearly rent of 50*l.* payable quarterly &c, and 12*l.* 10*s.* for one quarter ending at the said feast of the *Annunciation* &c were due, whereof the defendant afterwards and before the said time when &c on the 26th of *March* 1739 received 50*s.* parcel thereof; and 10*l.* residue were and still are unpaid &c. That the plaintiff within thirty days before the said time when &c to wit on the 24th of *March* 1738 fraudulently and clandestinely conveyed away the said goods from the said demised premises to the said dwelling-house in the said parish of *Saint Martin Ludgate* &c to prevent the defendant distraining the same for the said rent; and because the said 10*l.* were in arrear and unpaid at the time when &c the defendant well avows taking the said goods so fraudulently and clandestinely conveyed away and found in the said dwelling-house in the parish of *Saint Martin Ludgate* &c, within thirty days &c, for and in the name of a distress for the said rent &c.

A declaration in replevin is bad, if it do not specify the place where the goods were taken: but if the defendant do not demur, but plead to it, the defect is cured.

—A plea of *cepit in alio loco*, is a plea in bar though it pray *judgment of the declaration*.

—If the plaintiff in his replication do not answer some matter contained in the plea, or answer it improperly, the defendant must demur to it.

—In replevin the defendant pleaded *cepit in alio loco* and avowed taking the goods in the place in question, whither they had been fraudulently conveyed within thirty days &c from the demised premises, as a distress for rent: the plaintiff in his plea in bar traversed the avowry, and took no notice of the

plea; and it was holden ill on demurrer, the avowry being in the nature of a suggestion to entitle the party to a return of the distress and not traversable.

Barnes 353. and Bull. N. P. 53. S. C.

The

1744.

BULLY-
THORPE
against
TURNER.

The plaintiff in his replication said that the defendant ought not to avow &c, because he (the plaintiff) at any time before or since the said feast day and within thirty days &c did not fraudulently and clandestinely convey away the said goods &c in manner and form as the defendant in his plea alleged; and of this he put himself upon the country.

To this the defendant demurred, and prayed judgment and a return of the goods, together with his damages and costs; and for causes of demurrer said that the plaintiff had concluded his said plea by putting himself upon the country, whereas he ought to have concluded it by praying that the matter therein contained might be inquired of by the country; and also for that the said plea was uncertain, and put a matter in issue which was not issuable &c.

This case was argued at three different times, *May* 13th 1740; *May* 20th 1742; and *June* 15th 1743; and on this day the opinion of the Court was delivered, as follows, by

Willes Lord Chief Justice. "Objections in this case have been taken to the declaration, the plea, and the replication.

1st, The declaration is certainly not good, because it does not set forth the place in which the goods were taken, which it ought to have done, that the defendant might know with certainty to what he is to answer; and therefore if the defendant had demurred, judgment in chief must have been given against the plaintiff and a return of the goods awarded; as was holden in the case of *Ward v. Savile*, *Cro. Eliz.* 896; and *Moore* 678; in the case of *Read v. Hawke*, *Hob.* 16; and in an old case there cited 35 *Hen.* 6. fo. 40. But it is said there, and to be sure the law is, that if the defendant plead over, this defect is cured (a). This objection therefore will not hold in the present case, because the defendant has not demurred but pleaded over.

(a) So any defect, arising from the uncertainty of the goods mentioned in the declaration, is cured by the defendant's avowing. *Bern v. Mattaire*, *Cas. temp. Hardw.* 119; 2 *Str.* 1015; and *Bull. N. P.* 53; and *Kempston v. Nelson*, *T. 1 G. 1.*

B. R. 6 *Bac. Abr.* 71. oct. ed. cited and relied on by Lord *Hardwicke*; *Rep. temp. Hardw.* 121, in which a contrary decision of *More v. Clypsam*, *All.* 32, and *Sty.* 71, was overruled.

2dly, The plea of the defendant is certainly good, and the replication of the plaintiff undoubtedly bad; because he has said nothing to the plea, but has traversed the avowry which is not traversable, but is only in the nature of a suggestion in order to have a return of the goods.

1744.
BULLY-
THORPE
against
TURNER.

That this was a bad traverse was agreed in the case of *Hale v. Foot*, *Salk.* 93, and *Cartb* 139; in an anonymous case *Salk.* 94; and in another anonymous case 1 *Ventr.* 127, and in many other books, and was not denied by the counsel for the plaintiff; and therefore judgment must be for the defendant for the defect in the plaintiff's replication.

But the only question is, what judgment the plaintiff is entitled to. The defendant insists that he is entitled to a judgment in chief. The plaintiff says that at most he is only entitled to a judgment in abatement, but insists that the suit is discontinued by the defendant's demurring to the plaintiff's replication, and that therefore the Court can only give judgment that the suit be discontinued.

To shew that at most there can only be a judgment in abatement, the plaintiff insisted on two things;

1st, That the defendant's plea is only a plea in abatement.

2dly, That if it were a plea in bar, yet that it is only pleaded in abatement; and as a man may pray a less judgment than he is entitled to, the Court can only give such judgment as is prayed, the Court in this case can only give judgment in abatement. To shew that a matter in bar may be pleaded either in bar or abatement, was cited the case of *Stubbins v. Bird*, 2 *Mod.* 63, 64. and several other cases; and this point was not controverted by the counsel on the other side. But it was insisted by them that this is a plea in bar, and that it is pleaded in bar and not in abatement.

And we are all of that opinion.

First, We are of opinion that the plea of *cepit in alio loco* is a plea in bar, for the following reasons;

6 F

1st,

1744.
 BULLY-
 THORPE
 against
 TURNER.

1st, Because the place (a) in replevin is of the essence of the action, otherwise a defendant in replevin could not demur for want of a certain place in the declaration, which, as I have shewn before, he certainly may; nor can he avow in any other place, without denying the place laid in the declaration. And it is for this reason that, though a plaintiff may bring a new replevin for taking in another place, he cannot bring one for taking in the same place; and so, if he be nonsuit in replevin, and afterwards bring a writ of second deliverance, he cannot declare in a different place or vill from what he laid in his first declaration; and so it is holden in *Bro. Abr. "Second Deliverance,"* pl. 5.

2dly, It has been holden that in a plea in abatement you cannot object to any defect in the declaration; and so is the case of *Hastrop v. Hastings*, *Salk.* 212.

3dly, Upon enquiring of the officers both in this Court and in the King's Bench, an affidavit is never made of the truth of this plea, as is required in pleas in abatement by the stat. 4 & 5 *Anne* c. 16. Nor are defendants obliged to put in such pleas within the first four days of the term, as pleas in abatement must be put in by the course of the Court.

4thly, It appears by the manner of pleading these pleas, and the judgment given upon them, that they have always been considered as pleas in bar. So it appears by *Bro. Abr. "Replication,"* pl. 1. *Rast. Entr.* 555, pl. 4, 5, and 6; 556, pl. 7; *Thompf. Entr.* 274, pl. 11; *Clift's Entr.* 644; and in many other books which it would be too tedious to mention; in all of which the prayer is that the declaration may be quashed. There are indeed three entries in *Rast.* 554, which are different. The first prays judgment of the writ and declaration; the two other judgment of the writ, and that the writ may be quashed. But these prove nothing, because as I have already shewn a plea in bar may be pleaded in abatement. But the others prove very strongly that it is a plea in bar, because a plea in abatement cannot be pleaded in bar. It was indeed said that this prayer of a judgment, that the declaration might be quashed, was not a prayer of a judgment in chief, but only of a judgment in abatement; and the case of *Crosse v. Bilson*, as reported in 6 *Mod.* 103, and *Foot's* case in

(a) Vid. *Walton v. Kerfop*, 2 *Will.* 354.

Salk. 93, and *Carth.* 139, seem to countenance this opinion. But it is contrary to all the other cases and a multitude of precedents, which I shall mention by and by when I come to that point.

Lastly, this cannot be a plea in abatement, because whoever pleads a plea in abatement must shew that the plaintiff can have a better writ: whereas he can have no better writ in the present case; for it is in the usual form, as appears by the Register fo. 81; and *Glanville de legibus*, l. 12. c. 12.

As to the second point, that this though a plea in bar is pleaded only in abatement (a) in the present case, because it begins with praying judgment of the declaration, and concludes in the same manner. There are (as I have already said) but two cases that seem to favor this opinion, but there is a multitude of precedents which are otherwise in cases of demurrers to the declaration, where the judgment must be in chief; for there cannot be a demurrer in abatement, as was holden in the case of *Dominique v. Davenant*, *Salk.* 220. (b). I shall only mention some few of these precedents. *Co. Entr.* 3. b; 122. a; *Coryton v. Littlebye*; 2 *Saund.* 114; *Benson v. Welby*, *ib.* 150; *Wood v. Longuevill*, *ib.* 278; *Sacheverell v. Froggatt*, *ib.* 361; *Pinkney v. The Inhabitants of the East Hundred of the County of Rutland*, *ib.* 374: and as *Saunders* was so very learned a man and so well skilled in pleading, I think I need not mention any other authorities after him. But the same point was solemnly determined in the case of *Johnson v. Altham* both in this Court and the Court of King's Bench which came before that Court upon a writ of error, and was there determined *M. 12 An.* (c).

(a) If matter, that ought to be pleaded in abatement, be pleaded in bar, it is bad. *White v. Willis*, 2 *Wils.* 87.

(b) Vid. *Rayner v. Pointer*, *E. 16 G.* 2. *C. B. sup.* 410.

(c) This case is not clearly reported in 10 *Mod.* 192, 210. though it appears there that the judgment of the Court of Common Pleas was affirmed on error. — It was an action against an attorney in the Court of Common Pleas, who pleaded that there was no bill; and he prayed judgment

of the declaration aforesaid and that the said declaration should be quashed." The Court of Common Pleas gave final judgment against the defendant; and upon a writ of error brought in the King's Bench, the question was whether such plea with the conclusion were in bar or in abatement only, and so whether the judgment below should have been final, or only quod respondeat ouster. MS. coll. *Wilkes* Chief Justice.

There

1744.

BULLY-
THORPE
against
TURNER.

1744.
BULLY-
THORPE
against
TURNER.

There remains now but one point to be considered, whether this be a discontinuance or not; and the reasons for it were two;

1st, That the defendant by his demurrer prays a judgment in chief, whereas by his plea he has only prayed a judgment in abatement; and if this were so, probably the plaintiff would be in the right. But, as I have already shewn that this plea is pleaded in bar, and that the defendant has there prayed judgment in chief, there is an end of this part of the objection.

2dly, But the principal reason was, that as the plaintiff in his replication has given no answer to the plea, the defendant should have taken judgment on nil dicit, and that by demurring to a void replication he has discontinued the action. And of this opinion Lord Chief Justice *Holt* seemed to be in the case of *Hale v. Foot*; but the other three Judges held the contrary, and *Holt's* opinion seems to have been founded on *Herlakenden's* case, 4 Co. 62., which is certainly not law. That was an action of trespass for entering the plaintiff's close, and committing several trespasses, and the defendant in his plea omitted giving an answer to one of them, to which the plaintiff demurred, and it was holden to be a discontinuance. But in the case of *Hughes v. Philips*, Yelv. 38. which was determined both in the Common Pleas and on a writ of error in the King's Bench, it was holden that where a defendant puts in a plea, though a defective one, the plaintiff may demur to it without discontinuing his suit, and is not obliged to enter up judgment on nil dicit. The same was also determined in the case of Sir *J. Thornel v. Lassels*, Cro. Jac. 27; which being a case almost directly contrary to *Herlakenden's* case, I will shortly state it. It was an action of trespass for entering the plaintiff's close, and committing several trespasses there with horses cows and oxen, the defendant justified putting in two horses under a right of common, but said nothing as to the oxen and cows; the plaintiff demurred, and judgment was given for him.

And as these cases are both subsequent to *Herlakenden's* case, and therefore of greater authority, so the reason of the case is plainly

plainly with these subsequent resolutions; for it is absurd to say, that the *defendant* can discontinue the plaintiff's action by putting in a defective plea. If the plaintiff indeed in his replication omit to reply to part of the defendant's plea, he may discontinue his own suit. But it is absurd to say that the defendant can do it, and yet according to this doctrine, how can the plaintiff avoid it if the defendant put in a defective plea? If he demur, it is said he discontinues his own suit, for he ought to have entered up judgment by nil dicit, considering it as no plea at all: but this, I think, is a practice that ought not to be encouraged; for it is saying that the plaintiff may judge for himself, without submitting his case to the judgment of the Court. If indeed there were no plea at all, the plaintiff might enter up such judgment: but if there be in fact a plea, though a defective one, I think that in all cases he ought to pray the opinion of the Court, which he can do no otherwise than by demurring, and not to judge for himself (a).

1744.
BULLY-
THORPE
against
TURNER.

Upon the whole we are of opinion that the defendant in the present case is entitled to one of the two following judgments; either that the declaration shall be quashed, and that the defendant shall go without day, and that he shall have a return of the goods, and also that he shall recover his costs; or in this form, that the plaintiff take nothing by his writ, and that the defendant may go without day, and that he may have a return &c, and costs, as before. The first of these judgments is warranted by a precedent in *1 Townsend's Book of Judgments*, fo. 274; and the other by several precedents in *Coke's Entries*.

—"But my Brother *Draper* desiring time to consider in what manner he should enter up his judgment, we gave him what time he pleased, only directing him to acquaint the Court before he entered up his judgment in what manner he intended to enter it up. And

Draper Serjt. after a long consideration moved the Court (November 8th 1744) to enter up judgment for the defendant, after several continuances, in the following manner;

(a) See *Coppin qui tam v. Carter*, 1 D. & E. 462; and *Thellusson v. Smith*, 5 D. & E. 152.

1744.
BULLY-
THORPE
against
TURNER.

"It seems to the justices that the plea of the plaintiff above in reply pleaded is not good, therefore it is considered that the plaintiff take nothing by his writ, but that he be in mercy for his false claim thereof and that the defendant go thereof without day, and that he have a return of the goods and chattels, and in what manner &c let the sheriff make known here; and hereupon the said defendant according to the form of the statute &c also prays a writ of our Lord the King to inquire of damages &c; and it is granted to him returnable here at the same time &c;" which judgment, he said, was agreeable to the precedents in 2 *Townsh. Judgments* (a), title "*Replevin*," and *Co. Entr.* 589, a.; 591. a.; 595. a.; and 596, b.

And it was ordered by the Court that the judgment should be so entered up."

(a) P. 205.

E. 17 G. 2.
Monday,
May 7th.

ATKINSON *against* SETTREE.

[E. 16 GEO. 2. Rol. 861.]

If A. be illegally arrested by B. for a debt, a promise by C. to pay the debt claimed by B., in consideration of B.'s releasing A. out of custody, is void. But if it be stated in a declaration against C. on such a promise that B., in order to obtain payment of the debt from A., procured A. to be arrested by virtue of a certain writ &c duly issued out of such a court, it will be intended after verdict that the arrest was legal.

THIS was a special action on the case. The first count stated that on the 11th of *December* in the 16th year &c at *Westminster* and within the jurisdiction of the court of our Lord the King of his palace of *Westminster* the plaintiff, in order to procure the payment of the sum of 7*l.* 18*s.* which *Catherine Grimaldi* then owed him, by a certain writ dated the 10th of *December* in the same year duly issued out of the Court of Record of our said Lord the King of his palace of *Westminster* at the plaintiff's request, and directed to the bearers of the virge of the household &c, officers and ministers of the said court, commanding them to take the said *Catherine* by her body if she should be found within the jurisdiction of that court, and have her at the then next court to be holden on *Friday* the 17th of *December* then next to answer &c, and procured the said *Catherine* to be arrested &c and to be there kept and detained in prison &c; that afterwards on the said 11th of *December* in

consideration that the plaintiff at the request of the defendant undertook to release and discharge the said *Catherine* from her said imprisonment the defendant promised to pay the plaintiff 7*l.* 18*s.* and also the costs and charges by the plaintiff expended in that suit, with an averment that those costs amounted to 15*s.* 4*d.*, and that the plaintiff at the defendant's request discharged the said *Catherine* from her said imprisonment. There was a second count in the declaration, which, though it varied from the first in several particulars, was equally open to the objection afterwards made to the first. There was also a third count for money had and received.

The defendant pleaded the general issue, and at the trial the plaintiff obtained a verdict on all the counts, with 8*l.* 13*s.* 4*d.* damages.

A motion was made in *Michaelmas* term 1743 in arrest of judgment, which was opposed this day by *Prime* King's Serjt. and *Wynne* Serjt. and supported by *Skinner* King's Serjt. and *Draper* Serjt., and at a subsequent time

The rule was discharged (a).

(a) The grounds of the judgment do not appear in Lord Chief Justice *Willes*'s books: but the following account is taken from Mr. J. *Abney*'s MS. "*Skinner* and *Draper* Serjeants moved in arrest of judgment. First, It does not appear that any plaint was levied, and without that a *capias* ought not to issue. 2dly, It does not appear that the cause of action in the court below arose within the jurisdiction, and then the arrest was illegal; and there was no good consideration to support the promise. 1 *Rol. Abr.* 809; 2 *Mod.* 30; 107; 3 *Lev.* 23; 1 *Saund.* 74; 2 *Ld. Raym.* 1310. This is a void arrest, and therefore the discharge is no consideration. *Godb.* 358.

Prime and *Wynne* Serjts., for the plaintiffs, insisted that to support this action in the superior court it was immaterial whether or not there were a cause of action in the inferior court, or whether or not the

court below had a jurisdiction. The declaration sets out the writ duly issued, commanding the bearer of the virge to arrest the party, if found within the jurisdiction, and there to detain her, *Salk.* 201, 2. And the case of *Peacock v. Roll* in 1 *Saund.* 74. relates only to cases determined in the inferior court and brought up by error. The case of *Randal v. Harvey* is better reported in *Palm.* 394. than in *Godb.* 358. If the plaintiff's consent were necessary to release *Grimaldi*, and the officer could not discharge her without, then there is a good consideration to support the promise. They argued that it was not necessary that the arrest and detainer should be legal in order to make a good consideration; and for that purpose they cited 1 *Rol. Abr.* 12. pl. 12; 1 *Rol. Abr.* 19. pl. 6; *Hob.* 216; *Sir T. Raym.* 204; 1 *Rol. Abr.* 27. pl. 47. *Sty.* 459. Besides this is after a verdict.

1744.

ATKINSON
against
SETTLE.

1744.

M. 18 G. 2.
Wednesday,
Nov. 14th.

Verdict set
aside, because
one of the
jurymen was
not returned
on the nisi
prius panel
but answered
to the name
of a person
who was.

Barnes 453.
S. C.

NORMAN *against* BEAMONT.

“THE cause was tried at the last *Suffolk* assizes, and one *Richard Shepherd* was sworn upon the jury who gave a verdict for the plaintiff, damages 1 s. It was an action of trespass quare clausum fregit; and the Judge certified that the trespass was voluntary and malicious, which shewed plainly that he was not dissatisfied (a) with the verdict. But upon an affidavit of *Shepherd* himself that he was not returned upon the nisi prius panel, and that he answered to the name of *Richard Geater* a person returned on the panel, we had made a rule

verdict, it having been proved to the satisfaction of Mr. J. *Abney*, who tried the cause, that the arrest and promise were within the jurisdiction of the Palace Court. 1 *Sid.* 30. If a judgment be irregular or erroneous, to forbear to sue out execution is a good consideration to support an assumpsit, 2 *Rol. Rep.* 495; *Yelv.* 25; 1 *Ventr.* 120; 2 *Lev.* 3; 1 *Lev.* 257; 1 *Sid.* 392; Sir T. *Raym.* 211; *Poph.* 183; 1 *Sid.* 89; 1 *Saund.* 229; and 2 *Ld. Raym.* 795.

The Court inclined to think that if the party were under an illegal arrest or imprisonment the promise was not good (1): but the question was whether as this was after a verdict it did not now sufficiently appear that the writ duly issued below (2),

and consequently that the suit arose within the jurisdiction; and that this case greatly differed from writs of error on judgments in the inferior court where nothing shall be intended. But they ordered it to be spoken to again; and afterwards the plaintiff had judgment,” MS. *Abney J.*

(a) But it has since been holden that if it appear on the trial that the trespass was committed after notice, and the jury give less than 40 s. damages, the Judge is bound under the statute 8 & 9 W. 3. c. 11. s. 4. to certify that the trespass was wilful and malicious; in order to entitle the plaintiff to his full costs. *Swinnerton v. Farvis*, E. 22. Geo. 3. C. B.; and *Reynold v. Edwards*, 6 D. & E. 11.

(1) So a promise to pay, in consideration of forbearing to sue on a void security, is void, *Lloyd v. Lee*, Str. 94; and so is a promise to revive a security which is void in its creation, *Cockshott v. Bennett*, 2 D. & E. 763.—See also *Tooley v. Windham*, Cro. Eliz. 206. But in *Bull v. Steward*, 1 Wils. 255. in an action for an escape on mesne process out of an inferior court against the bailiff, it was holden that the defendant could not take advantage of any error in the process below, of which the defendant below might have availed himself. And in *Bentley v. Donnelly* and another, 8 D. & E. 127., in an action on the case for rescuing a debtor taken upon mesne process sued out of the Palace Court, it was decided that it was not a sufficient ground to arrest the judgment, that it was not alleged that the cause of action in the inferior court arose within the jurisdiction, or that it was not alleged that the party below did not appear at the return of the writ.—See however 1 *Rol. Abr.* 809. (F), pl. 3; and 2 *Mod.* 197.

(2) It was expressly stated in the declaration that the writ duly issued &c.

nisi (a) for a new trial, and a rule against *Shepherd* to shew cause why an attachment (b) should not go against him, as he knew that he was not returned and yet suffered himself to be sworn on the jury, and as it looked like a trick in him in order to set aside the verdict if it should be given against his friend.

1744.
NORMAN
against
BEAMONT.

And now *Prime* Serjt. shewed cause against the rule; and *Leeds* Serjt. shewed cause for *Shepherd*.

Prime Serjt. insisted that the Court could take no notice of any thing but what appeared on the record; and that as all appeared to be right on the record, the Court could not take notice of any thing that appeared in the affidavits. And he cited a case of *Bolman v. Crowle* in *B. R.*, where the defendant paid 24*l.* 10*s.* in court, upon which a rule was obtained according to the course of that court that it should be struck out of the declaration, but it seems it is never struck out: but the rule is produced at the trial, and then if the jury do not give more damages for the plaintiff than the money which is paid in, the verdict is always given for the defendant: but if the jury are of opinion to find more, they only give a verdict for the overplus. But in that case though the plaintiff had taken the money out of court, yet the rule not being produced at the trial the jury gave a verdict for the plaintiff for 24*l.* 17*s.* 6*d.* in which the 24*l.* 10*s.* was agreed to be included: but *Prime* said that upon a motion in *B. R.* for the defendant either that the plaintiff should refund the 24*l.* 10*s.* or that the verdict might be amended, the Court said they could not go out of the record, and therefore gave the defendant no relief. He insisted likewise that this objection was only matter of challenge and could not be taken advantage of after the verdict; and also that this was cured by the statute 32 *Hen.* 8. c. 30. s. 1 (c). And as it appeared that this was not a verdict against evidence, but plainly to the satisfaction of the Judge, he hoped that the Court would not strain a point to set aside this verdict.

(a) On *Wednesday*, *October* 24th, in the same term.

(b) In the case of *Wats v. Brains*, *Cro. Eliz.* 779. several of the jury were fined and imprisoned for misconduct.

(c) Which enacts that "if any issue be tried by the oath of twelve or more

indifferent men, in any of the King's courts of record, then the justice or justices by whom judgment thereof ought to be given shall proceed and give judgment in the same," notwithstanding any mispleading &c.

1744.

NORMAN
against
BEAMONT.

Leeds Serjt. read a second affidavit of *Shepherd's*, in which he swore that he was a young man and was never on a jury before; that he was returned as a jurymen at that assizes on the crown side, and not knowing the difference was sworn in this nisi prius cause; and that by reason of a great noise in the court he thought he was the person who was called; and being called again in another cause the mistake was discovered; and he cleared himself from any imputation of having done what he did by design; so the rule was discharged as against him.

Bootle Serjt for the rule insisted that the statute 32 Hen. 8. did not at all affect this case; and relied very much on the statute 3 Geo. 2. c. 25 (a), which says that twelve of those who are returned shall be sworn, and that they shall try the cause. And he cited the case of *Fines v. North*, Sir Wm. Jon. 302. Mich. 8. Car. 1. where upon error from a judgment in B. C., the error assigned was that but 23 were returned on the venire, and the habeas corpora was awarded against those 23 and one *Lambert*, and eleven and *Lambert* were sworn and found for the plaintiff; and the whole Court held that this was ill and not helped by any statute, because one was sworn who was not returned by the sheriff, and they reversed the judgment.

We were all of opinion that the statute 32 Hen. 8. did not extend to the present case, nor to any mistakes in the jury process; for if it did, there had been no occasion for making the statute 21 Jac. 1. c. 13 (b); the words of which statute likewise

(a) The eighth section directs sheriffs &c to annex to the venire facias a panel of not less than 48 or more than 72 jurors, containing their christian and surnames, additions and places of abode &c. Then the 11th section enacts that the name of each of those persons shall be written on a distinct piece of paper and put into a box, and shall be drawn &c "until 12 persons be drawn who shall appear, and after all causes of challenge shall be allowed as fair and indifferent; and the said 12 persons so first drawn and appearing, and approved as indifferent, their names being marked in the panel,

and they being sworn, shall be the jury to try the said cause" &c.

(b) The second section of that statute enacts that no judgment shall be stayed or reversed "by reason that the venire facias, habeas corpora, or distringas, is awarded to a wrong officer upon any insufficient suggestion; or by reason the visne is in some part misawarded or sued out of more places or of fewer places than it ought to be, so as some one place be right named; or by reason that any of the jury which tried the said issue is misnamed, either in the surname or addition, in any of the said writs, or in any return upon

wife shew that the present mistake was such an one as was not proper to be remedied.

1744.
NORMAN
against
BEAMONT.

We were of opinion likewise that this could be no cause of challenge. It could not be a challenge to the array, for there was no objection to the array; nor to the poll, for there was no objection to *Richard Geater* the person returned. But this was an extrinsic objection, not appearing on the face of the poll. A challenge to a jurymen supposes him capable of serving on the jury if the objection be answered: but *Richard Shepherd* was no jurymen at all. And as to the matter not appearing on the record, we said that in cases of this sort where the objection could not appear on the record we always admitted of affidavits; as in respect to a misbehaviour of any of the jury, or any declaration made by any of them (a) either before or after the verdict to shew that a jurymen was partial. And we thought that the statute 21 Jac. 1. c. 13. and 3 Geo. 2. c. 25. very much strengthened the plaintiff's objection.

My Brother *Abney* said that *Blackmore's* case, 8 Co. 156. plainly shewed that this was a mistake not amendable even after verdict.

And I cited the case of *Hassett v. Payne*, Cro. Eliz. 256. M. 33 & 34 Eliz. B. R. where on an attainit it appeared that one *George Ellinger* was returned on the venire, but one *Gregory Ellinger* was named in the habeas corpora and returned by that name and sworn on the jury; and it was holden by the whole Court that no attainit would lie, because there was no verdict, the trial being but by eleven.

We were therefore all of opinion that the rule ought to be made absolute for setting aside the verdict, but we had a doubt

upon any of the said writs, so as upon examination it be proved to be the same man that was meant to be returned; or by reason that there is no return upon any of the said writs, so as a panel of the names of jurors be returned and annexed to the said writ" &c.

the affidavit of a juror respecting the misconduct of the jurymen, *Vasie v. Delaval*, 1 D. & E. 11; though formerly such affidavits were received, *Parr v. Seames*, Barnes 438; and *Phillips v. Fowler*, ib. 441. the case above alluded to.

(a) But the Court will not now receive

about

1744.
 NORMAN
 against
 BEAMONT.

about the costs. We thought it hard that either the plaintiff or the defendant should pay the costs, because neither of them was in any fault. We proposed that the costs should abide the event of the next trial: but the defendant would not consent to it, and we thought that we could not make such a rule unless both the parties consented. We desired that the case of *Phillips v. Fowler* (a), *E. 9 Geo. 2.* in this court might be looked into to see what the Court did in that case in respect to costs, where they set aside the verdict for a very great misbehaviour in the jury; and we found upon inquiry that the Court at first made a rule for setting aside the verdict upon the defendant's paying the costs, but that afterwards the Court made a rule that the jury, who had grossly misbehaved themselves, should pay the costs on both sides.

At last upon mature consideration we made the rule absolute for a new trial without costs on either side (b)."

—"N. My Brother *Burnett* said he thought that in this case even at common law there ought to have been a venire facias de novo, according to the old method of proceeding before these motions for new trials, and that in that case there would have been no costs; which was a further reason for our not directing any costs to be paid in the present case (c).

(a) *Com. Rep.* 525; and *Barnes* 441. where a verdict was set aside because the jury had cast lots.

(b) In *Hale v. Cave*, 1 *Str.* 642, where the Court set aside the verdict on ac-

count of the misconduct of the jurymen, they ordered the costs to abide the event of the new trial.

(c) See the next case *Wray v. Thorn*.

M 18 G. 2.

Friday,

Nov. 16th.

The Court refused to set aside a verdict and grant a new trial, because one of the jurors was named *Henry* in the venire, the habeas corpora, and the posita, his real christian name being *Harry*. *Barnes* 454. S. C.

WRAY against THORN and HANCOCK.

"THIS was an action of trespass quare clausum fregit &c.

The defendant justified under a right of way; and the plaintiff replied extra viam, on which the issue was joined, and a view had, and a verdict for the plaintiff, damages 1 s.; and it was not pretended that it was a verdict against evidence. But

Henry Luppincott of *Alverdiscot* Esq. was returned on the venire by the name of *Henry*, and he is so named on the habeas corpora, the panel, and the postea, (there being a tales); and he was one of the viewers. But an affidavit was produced of *John Thorn* and *Lewis Wise*, in which *Thorn* swore that his right christian name was *Harry*; and *Wise* that he had taken a copy of the register, by which it appears that he was baptized by the name of *Harry*.

1744.

WRAY
against
THORN.

A motion had been made (a) by *Hussey* Serjt. to set aside the verdict; and he cited *Cro. Eliz.* 222. *Fermor v. Dorrington*; *Cro. Jac.* 116. *Blunt and Farley v. Snedston*; *Cro. Car.* 202. *Downs v. Winterflood*; and 5 Co. 42. *The Countess of Rutland's case*. We were inclinable to make it good if possible, but made a rule nisi that the matter might be thoroughly spoken to and considered. And now *Belfield* Serjt. shewed cause against the rule.

I gave my opinion in the following manner;

This question can come only before a court for judgment in one of these four ways;

By motion in arrest of judgment;

By motion for an amendment;

By motion for a new trial in this court; or

By writ of error in a superior court.

In order that I may be understood, I will in the first place state the present case. In the next place I will mention all the cases that I can find that seem to bear any resemblance to this. And in the last place I will give you my opinion on the present question.

I then stated the case as before, and then proceeded to mention the cases in the books. The first case that I cited was *Cro. Eliz.* 57. *Displyn v. Spratt*, P. 29 *Eliz. B. R.* which was thus; *Thomas Baker* of *D.* was returned on the venire, in the distringas he was called *Thomas Carter* of *D.*, and by that name sworn on the jury. A motion was made in arrest of judgment, and a

(a) On Wednesday October 24th in the same term.

1744.

WRAY
against
THORN.

case cited where *George Thompson* was returned on the venire and *Gregory Tompson* was returned on the panel and sworn, and it was held to be a void verdict; for the Court said that there was a great deal of difference between a mistake in a christian name and a mistake in a surname; for a man may have two surnames but he can have but one christian name; but no judgment appears.

In *Cro. Eliz.* 222. *Fermor v. Dorrington*, P. 33 *Eliz. B. R.* in an action for words, after verdict judgment was stayed, because *Taverner* was in the return to the venire, and *Turnor* in the distringas; and he attended and was sworn by the name of *Turnor*. A case was cited in the same case of *Douby v. Willott*, where a juror was returned by the name of *Gregory* in the venire and in the distringas by the name of *George*, and he was sworn by that name, and judgment was arrested. Another case was cited out of the Exchequer, where one *Mixael* was returned on the venire, and in the distringas it was *Michael*; both these were surnames; one *Michael* was sworn on the jury, and judgment was stayed for this reason. In the principal case the Court at first doubted, because the variance was in the surname, for the reasons before given; but afterwards resolved that the judgment should be stayed.

In *Cro. Eliz.* 256. *Haffett v. Payne*, M. 33 & 34 *Eliz. B. R.* in an attaint it appeared that one *George* was named in the return to the venire, and in the distringas he was named *Gregory*, and so sworn; and held *per totam Curiam* that no attaint would lie, because no verdict, the trial being but by eleven. In *Cro. Eliz.* 258. *Cotton's case*, the same term, in an action for words it was *J. S. of Abbotson* in the return to the venire, and in the distringas *J. S. of Abbasan*, and ordered to be amended after a verdict. And in the same term between *Mortimer* and *Oger* it was *De Huft* in the return to the venire and *De Hurst* in the distringas; and on a motion in arrest of judgment held to be well enough, and the plaintiff had his judgment. In 5 Co. 42. *The Countess of Rutland's case*, M. 34 & 35 *Eliz. B. R.* a motion was made in arrest of judgment because *Robert Moore* was returned on the venire, and he was so named in the distringas: but in the panel before the justices of Nisi Prius he

was named *Robert Mawre*, and so he was named on the *postea*; and it was insisted that a stranger who was not returned was sworn on the jury: but, by the whole Court, if it can appear by examination that his right name was *Robert Moore*, so that he was well returned on the *venire*, and that the same man was returned and sworn, the *postea* may be amended. It was held otherwise in several cases there cited out of the Year-Books; but it was said in that case that now the law was that judgment should not be stayed, for that these discontinuances were aided by the stat. 32 Hen. 8. c. 30. and 18 Eliz. c. 14. But it was there said that even now if a juror be misnamed in the panel annexed to the *venire*, though he be rightly named in the subsequent process, it is not amendable, and that it was so held in *Codwell's case* (a). *M. 35 & 36 Eliz. B. R.* It appeared in that case upon examination that it was the same man who was returned on the *venire*, and that his right name was *Robert Moore*; and for the reasons aforesaid by the opinion of the whole Court the *postea* was amended, and judgment given.

In *Danv. Abr.* tit. "Amendment," p. 330. is the case of *Hugo v. Payne*, 39 Eliz. B. R. where *Tippett* the true name was returned on the *venire*, but in the *habeas corpora* and *distringas* he was named *Typper*; yet if he be sworn and try the issue by his right name, it shall be amended; and said that the same was adjudged in *Marshall's case*, 40 Eliz. B. R., and in the case of *Arundel v. Blanchard*, Mich. 13 Jac. 1. But in the case of *Floyd v. Bethell*, T. 13 Jac. 1. B. R. there also cited, in the *distringas* the juror was *Ap Pell* and one *Ap Bell* was sworn, and said that it could not be amended by the Court after the death of the sheriff; for it cannot be intended to be the same man, for they are different names in *Wales* where this trial was; but said that, if the sheriff who made the return had been living, he might have amended it. Several more cases are there cited; and in p. 331. where the mistake is in the surname; but if right in the return to the *venire*, the Court would amend it. In *Cro. Jac.* 116. *M. 2 Jac. 1. B. R.* in error from a judgment in B. R. the error assigned was the juror was named *Constantinus* in the return to the *venire* and in the *distringas*, but he was re-

(a) 5 Co. 42. b. and 43. a.

turned

1744.

WRAY
against
THORN.

1744

WRAY
against
THORN.

turned in the panel and sworn by the name of *Constantius*; and it was held to be a manifest error, and not amendable.

All these cases were before the stat. 21 Jac. I. c. 13. s. 2. And from these it appears that even before that statute mistakes in the surname of a juryman were generally holden to be amendable, if the return to the venire were right.

But the statute 21 Jac. I. c. 13. has put the matter beyond all doubt in respect to surnames. The words are "no judgment shall be stayed or arrested after a verdict because any of the jury who tried the issue is misnamed either in the *surname* or addition in any of the jury process, or in any return thereupon, so as upon examination it appear to be the same person who was meant to be returned." So this statute has settled the point as to surnames, but has left the point as to christian names as it was before. Nor do I know that such mistakes are remedied by any of the subsequent statutes.

But even as to christian names the cases are various both before and after this statute. In the cases already cited it seems to be held that mistakes in the christian name were not amendable. But in *Codwell's* case, 35 & 36 Eliz. B. R. 5 Co. 42. b. and 43. a., and which is called the case of *Goldwell v. Parker*, in *Cro. Car.* 203., in an appeal of maihem between *Codwell* and *Parker* verdict for the plaintiff; and moved in arrest of judgment that there was a variance between the return of the venire and the distringas and the postea in the name of a juryman. In the return to the venire he is named *Palus Cbeak*, in the distringas and postea *Paulus*, by which name he was sworn; there judgment was arrested, because he was misnamed in the panel to the venire; but it was held that if he had been rightly named on the return to the venire, and wrong in the other process, it should have been amended on examination.

If in the return to the venire a juror be called *Pearse Thomas* and so in the habeas corpora, but in the panel annexed to the habeas corpora he is called *Peeze Thomas*, and is sworn by that name, and it appears upon examination that he was the same person that was returned; held to be amendable, though this was

was upon a writ of error. *T. 42 El. B. R. Danv. Abr. tit. "Amendment,"* p. 330.

1744.

WRAY
against
THORN.

These cases were before the statute. Since the statute, in the case of *Rowe and Bond v. Devys*, *M. 15 Car. 2. B. R. in Cro. Car. 563*; *Sir W. Jon. 448*; and *Danvers 330*; in the return to the venire a juryman was named *Samuel*, and so in the distringas, but in the panel annexed he was called *Daniel*, and sworn by that name as appears by the record, and gave a verdict for the plaintiff; though this was not within the stat. 21 *Jac. 1.*, yet it appearing upon the examination of the juror himself that he was the person returned, and that his right name was *Samuel*, and that there was no other person of that name in the parish, and by the examination of the sheriff and his clerk that it was the misprision of the clerk, who, though he had the distringas before him, wrote *Daniel* for *Samuel* in the panel; and the juror likewise swearing that, there being a great noise in the court when he was sworn, he answered supposing himself to be called by his right name of *Samuel*; the record was ordered to be amended, and the judgment was not stayed; and the Court held, though the statute 21 *Jac. 1.* extended only to surnames, and did not therefore help the present case, yet that this was amendable by the common law, and by the statute 8 *Hen. 6. c. 12.* as being only a misprision of the clerk.

There is indeed a case in *Cro. Car. 203.*, between *Downs* and *Winterslood*, *M. 6 Car. 2.* where this seems to be doubted: but that was in an attain, and no judgment appears to be given. The case was thus; one of the jurors was returned by the name of *Alexander Prescot*; in the resummons, which is in the nature of a distringas, he was called *Alexandrus Prescot*, and was sworn by that name; the verdict of the petit jury was affirmed, and this was moved in arrest of judgment: the Court held clearly that this was not aided by the statute 21 *Jac. 1. c. 13.* But as the cases cited to arrest the judgment were where the mistake was in the return to the venire, and as it appeared there that the return to the first process was right, *Alexander* being the true name, and it appearing that he was the juror who was intended to be returned and sworn, the Court seemed

1744.

WRAY
against
THORN.

rather inclined to think that the second process might be amended, but adjourned the consideration thereof.

These are the most considerable cases that I can find, which seem to bear any resemblance to the present.

And now I shall come to the consideration of the present case. It was truly said by the counsel for the plaintiff that we ought not to go out of the record (unless in respect to such matters as throw an imputation on the jury and cannot appear on the record itself, concerning which I have been more particular in the case of *Norman v. Beaumont* (a) in this term, so I need not repeat what I there said); and they cited the case of *Arundel v. Arundel*, Cro. Jac. 12; and *Dyer* 163. b. pl. 56. which are full to this purpose.

Now the record here being right, and no variances appearing thereupon, there is no occasion for any amendment, nor can the judgment be reversed on a writ of error, and for the same reason the judgment cannot be arrested: whereas in all the cases cited the variance appeared on the record; and therefore unless the record were amended, the judgment ought to have been arrested, or it would have been reversed on a writ of error. The only question therefore in every one of them was whether the record should be amended.

So all the cases were very different from the present; in which there can be but one question, whether by reason of a matter not appearing on record but laid before the Court by affidavit we shall set aside the verdict and grant a new trial. And I think it would be very unjust to grant a new trial in the present case, since there is no objection to the verdict itself, since the objection does not appear upon the record, and since it appears by the affidavit which makes out the objection that the jurymen who was sworn on the jury and tried the cause was the person who was summoned and returned and intended to be a juror in the cause, which is the very reason relied on in the statute 21 Jac. 1. c. 13. and in all the cases where amendments have been ordered.

(a) See the preceding case, *sup.* 484.

I did not lay much stress upon the answer which was given by the counsel for the plaintiff, that a man might have two christian names, one at his baptism and another at his confirmation; but for the reasons aforesaid I was of opinion that the rule ought to be discharged.

1744.

WRAY
against
THORN.

My Brothers *Abney* and *Burnett* were both of the same opinion. They thought that *Henry* and *Harry* might be taken to be one and the same name. That, as granting new trials was merely in the discretion of the Court, they thought this was such a case that the Court ought not to set aside the verdict, since it was agreed to be a just verdict, and since no variance appeared on the record, and there was not any imputation upon any of the jury.

And Brother *Burnett* said that the only question in this cause was, whether, when Courts always go as far as they can to support a verdict, we should in this case set aside a verdict contrary to justice and to the reason of all the cases that had been cited. He likewise cited *Arundel's* case, *Hob. 64*, where *Lifney* in the habeas corpora was made *Lifney* to agree with the venire, though the true name was *Lifney*, because they found so like. He also cited some other cases where *Baskervill* and *Baskerfield*(a), *Stoke* and *Stokes*, *Hastin* and *Hastings*, *Mac Kair* and *Kair*, had been holden to be the same names.

And *per Curiam*, the rule was discharged (b).

—N. This case is very different from the case of *Norman v. Beaumont* (c); for there a person was sworn upon the jury by mistake who was never summoned or returned in the room of one who was summoned and returned."

(a) Vid. 2 *Rol. Rep.* 168.

(b) In *R. v. Roberts*, 2 *Str.* 1214. on a trial at bar of a traverse to an inquisition of lunacy, the Court ordered (against the defendant's consent) the christian name of

one of the jurymen to be altered from *Henry* to *Harry* on his acknowledging that he was the person summoned.

(c) The preceding case, *sup.* 484.

1744.

M. 18 Geo. 2.
Saturday,
Nov. 24th.JOHN THOMAS *against* MARGARET CADWALLADER,
Administratrix of CHARLES CADWALLADER.

In an action
on a covenant
against a lessee
for not re-
pairing (the
covenant ad-
ding "the
lessor allow-
ing and as-
signing tim-
ber for the
repairs") it is
necessary to
aver that the
lessor did al-
low and assign
timber &c.

"COVENANT. The plaintiff declares upon an indenture dated 10th of *February* 1720, whereby the plaintiff and one *Rebecca Thomas* since deceased demised to *Charles Cadwallader* a messuage and tenement in *Bishop's Castle* with the stable mill garden and backside or yard thereto belonging (except as therein excepted) to hold the same from the 25th of *March* then next for twenty-one years under the rent of 10*l.* a-year payable at *Michaelmas* and *Lady-day*. And the said *Charles* did thereby covenant for himself his executors administrators and assigns to and with the said *John Thomas* his heirs and assigns that he the said *Charles* his executors administrators and assigns should and would from time to time and at all times during the said term uphold maintain repair and keep the said messuage and other the demised buildings thereto belonging in good and sufficient repair, and the same at the end or sooner determination of the said term should and would surrender and yield up to the said *John* and *Rebecca* their heirs and assigns in good and tenantable order and repair, *he the said John his heirs and assigns finding allowing and assigning timber sufficient for such reparations during the said term to be cut and carried by the said Charles his executors administrators and assigns.*

And the plaintiff sets forth that *Charles* entered by virtue of the said indenture, and being possessed of the said demised premises died at *Ludlow* on the 22d of *April* 1735; and that administration of all his goods &c with his will annexed was afterwards duly granted to the defendant, who by virtue thereof entered upon the demised premises and was possessed thereof until the end of the said term; and that at the end of the said term of twenty-one years and for the space of five years then before the said messuage and other the demised buildings thereto belonging were greatly ruinous and in decay and wanted necessary reparations and amendments; and that the defendant during her possession of the said messuage &c did not uphold maintain repair and keep the same in good and sufficient repair,
and

1744.

THOMAS
against
CADWALLA-
DER.

and the same at the end of the said term surrender and yield up in good and sufficient order and reparation, but at the end of the said term left the same so in decay and wanting great reparations as aforesaid; contrary to the form and effect of the said covenant &c; and lays his damage at 100 l.

The defendant pleads that the plaintiff during the said term did not find allow or assign timber sufficient for upholding repairing maintaining or keeping the said messuage and other the said demised premises in good and sufficient repair; to which the plaintiff demurs generally, and the defendant joins in demurrer.

And upon this it came in judgment before the Court.

Bootle Serjt. for the plaintiff insisted on three things;

1st, That the plea was too general; it only saying that the plaintiff during the term did not find &c.

2dly, That the finding of timber by the plaintiff was not a condition precedent, but a mutual or reciprocal covenant; and consequently that the breach of it cannot be pleaded to an action brought on the covenant of the lessee.

3dly, That if it could be insisted on by way of plea, yet that a request ought to have been pleaded.

And he cited the case of *Warren v. Astors*, Sir Tho. Jon. 206., where the lessor covenanted that the lessee should have liberty to cut trees for repairing (a), *he making good the fences and ditches*, and it was holden not to be a condition but a mutual covenant. That the word "paying" has been held to be a covenant and not a condition (b). And he cited a case in *B. R.* reported in *Lucas* (c) 153, 189, and 222, where it was held that, if a man covenanted to pay money due on a judgment to a person, he assigning the judgment, on an action of covenant brought for

(a) This case is not accurately stated. It was an action of trespass by a lessee for years; to which the defendant pleaded that *Martin*, who had leased to the plaintiff, excepted the trees with liberty to cut and carry them away *he mending the fences and filling up the pits*, and that *Martin* afterwards granted the trees and the liberty to the defendant; and then he justified under this liberty &c. The plaintiff de-

murred, and shewed for cause that the defendant had not alleged that he had mended the fences and filled up the pits; but it was not allowed, because it was not a condition but a covenant for which the lessee had a remedy by action.

(b) The case of *Sir George Bickerstaffe*, cited *ib.*

(c) 8 *Modern*.

1744.
THOMAS
against
CADWALLA-
DER.

nonpayment of the money the defendant could not insist that the plaintiff had not assigned the judgment, it being a mutual covenant and not a condition precedent. He cited likewise 3 *Lev.* 41.; the case of *Pordage v. Cole*, 1 *Saund.* 319; and 1 *Rol. Abr.* 518, the case of *Holder v. Taylor*; to shew that these words in the present case are not to be considered as a condition but as a mutual covenant. But in the case cited out of *Rolle* the words are plainly words of covenant; and it is there said that if the words had been that the lessee should repair, *provided* the lessee find him great timber for it, they would not have been considered as a covenant on the part of the lessor, but as a qualification of the covenant of the lessee; so that this case is rather an authority against the plaintiff.

He insisted likewise that if this were necessary to be done by the plaintiff, yet that the first act was to be done by the lessee; for that he was to request the plaintiff to find timber; and that he ought likewise to shew that these were such repairs for which timber was necessary; for which purpose he cited 1 *Rol. Abr.* 465. *pl.* 28.

Hayward Serjt. for the defendant did not much insist that the plea was good, but said that the declaration was bad; and that then it was immaterial whether the plea were good or not. He said that these could not be considered as mutual covenants, for that the finding of timber was a condition precedent, or the qualification of the lessee's covenant. That *ipso faciente* and *si ipse fuerit* have exactly the same meaning; and that if the words had been *si ipse invenerit*, it had undoubtedly been a condition precedent. That the breach therefore is not assigned upon the covenant in the deed; for the covenant to repair is a qualified covenant, and *sub modo*, and the breach is assigned of an absolute covenant to repair. He cited the case of *Large v. Cheshire*, 1 *Ventr.* 147. 1 *Rol. Abr.* 414. and 2 *Danvers* 229. title "Covenant," (C), *f.* 2 and 3. where it is holden that though the word "agreed" makes a covenant, yet that "provided always" makes no covenant but is a condition precedent. And he put the case that a man should covenant with *A.* to go to *York*, *A. finding him a horse* for that purpose; where it was plain that the covenantor was not obliged to go to *York* unless *A.* provided him a horse; which case (he said) was exactly parallel with the present. He therefore

therefore insisted that the plaintiff ought to have set forth in his declaration that he was always ready to find and assign him timber, and that not having done so the declaration was insufficient.

1744.
THOMAS
against
CADWALLA,
DEB.

We were all of that opinion, and gave no opinion upon the plea.

I thought that none of the cases, though in my opinion they had gone too far already, came up to the present case; for that this finding of timber was a thing in its nature necessary to be done first, and therefore must be considered as a qualification of the lessee's covenant. When two covenants in a deed have no relation to each other, I was clearly of opinion that the non-performance of one could not be pleaded in bar to an action brought for the breach of another covenant in the same deed; and for this plain reason amongst others that the damages sustained by the breach of one such covenant may not be at all adequate to the damages sustained by the breach of the other; and therefore I held that all the cases were right where nothing more was determined. The case of assigning the judgment is plainly different; for a man may pay the money before the judgment is assigned. The case of paying rent is also different, because a man may enjoy the land, nay ought to enjoy it, before he pays rent. The case of repairing the hedges and fences likewise stands on the same reason; for there the wood must be cut down before the hedges and ditches are mended. But a man cannot repair until the timber is assigned him for such repairs. And the case in 1 *Rol. Abr.* 518, and that in 2 *Danvers* 229, are strong authorities for the defendant; for the word "provided", which was there holden to make a condition, is not so strong an expression as the words "finding and allowing" in the present case. But I expressed my dislike of those cases, though they are too many to be now over-ruled, where it is determined that the breach of one covenant, though plainly relative to the other, cannot be pleaded in bar to an action brought for the breach of the other, but the other party must be left to bring his action for the breach of the other; as where there are two covenants in a deed, the one for repairing and the other for finding timber for the reparations; this notion plainly tending to make

1744.
THOMAS
against
CADWALLA-
DER.

two actions instead of one, and to a circuity of action and multiplying actions, both which the law so much abhors. If therefore this were a new point, I should be inclined to be of opinion that, though where there are mutual covenants relative to one another in the same deed a plaintiff is not obliged in an action brought for the breach of them to aver the performance of the covenant which is to be performed on his part, yet that the defendant in such action may in his plea insist on the nonperformance of the covenant to be performed on the part of the plaintiff: but this has been so often determined otherwise, that it is too late now to alter the law in this respect. But where words make a condition precedent or a qualification of a covenant, as the present case plainly is, all the cases agree that the plaintiff in his declaration must aver the performance of such condition or qualification.

And my Brothers *Abney* and *Burnett* being both of the same opinion with me,

Judgment was given for the defendant (a)."

(a) See *Mucklestone v. Thomas, E. non, sup. 153*; &c; and the cases there 12 Geo. 2. *sup. 146*; and *Acherley v. Ver-* referred to.

M. 18 Geo. 2.
Saturday,
Nov. 24th.

JEFFRY HASSELL on the Demise of JOHN HODGSON
against FRANCIS GOWTHWAITE.

THE opinion of the Court was thus delivered by

Willes, Lord Chief Justice. "This comes before the Court upon a case made before my Brother *Abney* at the *Lent* assizes for the county of *York* held on the 7th of *March* 1742 on the trial of an ejectment for a moiety of a mill; and the case is as follows.

Richard Diasbury, being possessed of the premises in question under a lease for lives, by his will duly executed bearing date after the widow's marriage or death he willed that B. should pay the rent-charge to C. his executors administrators and assigns: the widow married, on which C. received the rent-charge during his life, and then C. died, without disposing of the rent-charge, appointing D. his executor; held, that D. had no right of entry for nonpayment of the rent-charge.

—If D. had had a right of entry, a demand would have been necessary. *Semb.*

—D. the executor is entitled to the rent-charge; *semb.*; and may distrain for it.

the

the 29th of *May* 1714 gave, amongst other things, to his brother-in-law *Francis Gowthwaite* the defendant, upon the exceptions provisoes and payments following, all his personal estate and all his copyhold estate which he purchased of Sir *J. Ingleby* Bart. to him and his heirs for ever, pursuant to a surrender by him made thereof. And he also gave to him his executors administrators and assigns (but subject also to the following payments and provisoes) all the corn-mill kiln which he purchased of Sir *A. Danby* with all it's perquisites and appurtenances; all which said personal estate copyhold leasehold and mill and kiln with their appurtenances he the said *Francis Gowthwaite* his heirs and assigns, or his executors administrators and assigns, according to the different tenures thereof, shall or may have and enjoy upon the following conditions provisoes and payments and no other; and amongst many other payments provisoes and conditions there are the following clauses which are the only ones that are material in the present case, *viz.* that he shall pay to his (the testator's) wife *Elizabeth* quarterly payments of 3*l.* 10*s.* per annum without any deductions for and during her natural life or until she shall marry again and no longer. And gave another 3*l.* 10*s.* per annum to be paid quarterly by four equal payments to his wife for the sole use of necessaries and education of his daughter *Hannah* during her minority; and directed that these two annuities shall be charged out of the moiety of the said mill, and that upon nonpayment thereof or of any part thereof contrary to the true intent of his will for more than the space of twenty days after each intended payment *it shall and may be lawful for his said wife in her own or her said daughter's name to enter upon and enjoy the said moiety of the said mill and it's appurtenances until such arrears with all reasonable charges be fully discharged and paid, and this when and as often as need shall require.* And that his said daughter so soon as she shall arrive at the full age of twenty-one years shall actually enter upon the quarterly payment of 3*l.* 10*s.* per annum; and in case her said mother shall be then either dead or married again that she shall enter upon the other 3*l.* 10*s.* per annum which was payable to her said mother; which payments shall commence from and after the death of his said wife. And that in case his daughter shall die in her minority and without lawful issue then

1744.
 HASSELL
 dem. HODG-
 SON
 against
 GOWTH-
 WAITE.

1744.
 HASSELL
 dem. HODG-
 SON
 against
 GOWTH-
 WAITE.

living, his nephew *Thomas Hodgson* shall enter upon the said rent-charge belonging to his said daughter at what time his said daughter and without lawful issue should have arrived at the said full age of twenty-one years. And further that in case his said wife shall marry again or however after her death (his said daughter being also dead in her minority and without issue) then his will and mind is that his said brother-in-law *Francis Gowthwaite* his executors administrators and assigns shall pay also the quarterly payment of 3 *l.* 10 *s.* (as till then due to his said wife) to his said nephew *Thomas Hodgson* his executors administrators and assigns, always intending that in case any of the said three lives then in being relating to the said will shall happen to drop in the interim that his said daughter or her lawful issue or else the said *Thomas Hodgson* shall pay one moiety of the charge relating to the renewing of the said lease to his executor. He constituted his said brother in law *Francis Gowthwaite* sole executor of his said will; and afterwards the testator died so seised on the same day and year.

Hannab the daughter in the lifetime of her mother died in her minority and without issue; and the said *Thomas Hodgson* the nephew at the time when the said daughter would have arrived at her age of twenty-one years entered on the said rent-charge of 3 *l.* 10 *s.* per annum so devised to the daughter, and received the same during his life.

Elizabeth, the widow, afterwards married again one *William Wood*, on whose marriage the said *Thomas Hodgson* became also entitled to the said other rent-charge of 3 *l.* 10 *s.* so devised to the said wife, which by the said will is devised to him his executors administrators and assigns as aforesaid, and was possessed thereof and received the same during his life.

The said *Thomas Hodgson* in his lifetime on the 14th of June 1739 made his will, and the said *John Hodgson* the lessor of the plaintiff sole executor, and then died; and because the said rent-charge of 3 *l.* 10 *s.* so devised to the said *Elizabeth* the widow and after her decease or marriage to the said *Thomas Hodgson* his executors administrators and assigns as aforesaid was in arrear and

and unpaid to the said *John Hodgson* the lessor of the plaintiff as executor of the said *Thomas Hodgson*, the said *John Hodgson* brought his ejectment. And three points upon the trial were reserved for the opinion of this Court,

1744.
HASSELL
dem. HODG-
SON
against
GOWTH-
WAITE.

1st, Whether *John Hodgson* the lessor of the plaintiff had any right to enter for nonpayment of the said rent-charge by virtue of the said will.

2dly, Whether a demand of the arrears of the rent-charge ought to have been made by him before the bringing of the ejectment.

3dly, Whether the rent-charge determined on the death of the said *Thomas Hodgson*.

As to the 3 *l.* 10 *s.* a-year given to the daughter, and given over to *Francis Hodgson*, the counsel for the plaintiff (a) did not insist on it, otherwise I should have thought that that likewise (b), as to the right of *Thomas Hodgson*, (which is the third question,) might have admitted of a dispute, as well as the other: but as that is given up by the counsel for the plaintiff, I shall confine myself to the devise of the 3 *l.* 10 *s.* given to the wife.

And if we should be of opinion as to either of the three questions against the lessor of the plaintiff, it will be just the same thing as if were of opinion against him upon all of them; for if he had no right to the rent, or (if he had) had no right to enter for nonpayment, or (if both these points were with him) if a demand were necessary before bringing the action, as it is admitted that no demand was made, in either of these cases judgment must be for the defendant. And as we are all clearly of opinion against the plaintiff on the first question, we need not give any opinion on the other two: however, as they were fully spoken to by the counsel, I shall say a little upon them,

(a) The case was argued on Tuesday the 6th of November 1744 by *Bootle* Serjt. for the lessor of the plaintiff, and by *Dra-per* Serjt. for the defendant.

(b) There seems to be a distinction between the two sums in the will; the first is given to the widow during her widowhood, and afterwards to the nephew *T.*

Hodgson his executors administrators and assigns: but with regard to the other, which is given to the daughter, the deviser merely said that "on her dying a minor and without issue his nephew *T. Hodgson* shall enter upon the said rent-charge belonging to his said daughter" &c.

1744.

HASSELL
dem. HODG-
SON
against
GOWTH-
WAITE.

but without giving any positive opinion, and shall begin with the last question first, as being a question on the right itself.

And this may be divided into two questions,

1st, Whether it was the intent of the testator that the rent-charge should determine on the death of *Thomas Hodgson*, or go to his executors &c.

2dly, Whether, if it were his intent, the devise can be so construed according to the rules of law; for if his intent be not consistent with the rules of law, it cannot take place.

1st, We are rather inclined to think that the testator intended that the rent-charge should continue as long as the estate out of which it issued, and that if that should last (as it did) after the death of *Thomas Hodgson*, the rent should go to his executors &c. For the rent is devised in the same words as the estate, each of them to the executors administrators and assigns of the first devisee. The observation made on the fourth (a) clause in the will will not hold, that it is plain thereby he intended that the estate should go to the heirs of *Francis Gowthwaite*, for the word "heirs" there is plainly satisfied by referring it to the devise of his copyhold; but the will is devised in express words to *Francis Gowthwaite* his executors administrators and assigns. In the next place it is plain that he did not intend that the rent should determine on his daughter's death, but that her issue should have it; and it seems as if he intended that *Thomas Hodgson* should have as good an interest in it as his daughter, since he directed him to pay as great a share of the renewal money as his daughter or her issue were to pay. Supposing it therefore to be his intent that the rent-charge should go to the executors &c of *Thomas Hodgson*,

2dly, Let us see whether by the rules of law the words of the devise will bear such a construction. Now all the cases cited to the contrary were before the statutes 29 Car. 2. c. 3. f. 12. and 14 Geo. 2. c. 20. f. 9. And though before those statutes it might probably have been very difficult to reconcile such a devise with the rules of law, yet we think that since

(a) The first clause in the will as abstracted in this case.

these

these two statutes it may have such a construction as is contended for by the plaintiff. The material cases cited to the contrary were *Salter v. Boteler*, *Moor* 664; a rent was granted to one of his executors administrators and assigns during the life of another; the grantee died intestate living the cestui que vie; it was held that the administrator could not be a special occupant of this rent, but that it determined on the death of the grantee; but it was said that the grantee might have assigned it in his lifetime, and that if it had been granted to him and his heirs the heir would have been a special occupant. The same doctrine is laid down in 2 *Rol. Abr.* 151. G. 3. And it is there said that the reason is because a freehold cannot go to the executor or administrator. But the contrary is there held as to lands: *ib.* G. 2. For it is said that if a man grant lands to one and his executors during the life of another, if the grantee die his executor shall be a special occupant, though it be a freehold. And the same is said in *Vin. Abr.* title *Occupant*, p. 71. The law therefore before the statutes seems to be clear that there could be no general occupant of a rent; and for this reason, because there can be no entry on a rent according to the rule laid down in *Co. Lit.* 41., that there can be no general occupant of any thing that lies in grant. But the books seem to agree that the heir might be a special occupant of a rent, though not properly called an occupant, but rather a person who takes by the express words of the grant, and therefore may most properly be called a special grantee or assignee (a). And the books, most of them, say that an executor or administrator cannot be a special grantee of a rent granted per auter vie, because it is a freehold: but there are some cases that I have already mentioned to the contrary (b). So that this was a doubtful point before the stat. 29 *Car.* 2. c. 3. and 14 *Geo.* 2. c. 20.: but the doubt now seems to be removed by those statutes (c). For in both the statutes there are these words, *an estate or estates per auter vie*, which extend to rents

(a) Vid. *Co. Lit.* 387. b.

(b) Vid. 3 *Atk.* 466.

(c) By the former (sect. 12) it is enacted that estates per auter vie shall be devisable, and if not devised chargeable in the hands of the heir as assets by descent, if they shall come to him by reason of a

special occupancy; and if there shall be no special occupant, they shall go to the executors or administrators of the grantee, and be assets in their hands. By the latter, in case of intestacy the surplus is distributable as personal estate.

1744.

HASELL
dem. HODG-
SON
against
GOWTH-
WAITE.

1744.
 HASSELL
 dem. HODG-
 SON
 against
 GOWTH-
 WAITE.

as well as lands. And as these statutes make executors and administrators capable of taking such estates, and direct in what manner they shall be applied and distributed, we think that since these statutes an executor or administrator may take as a special grantee of a rent, granted or devised to one and his executors or administrators (a). If therefore the intent of the devisor in the present case was, as we think it was, that the rent should go to the executors or administrators of *Thomas Hodgson*, we are opinion that there is now no objection in point of law why they may not take. We are therefore rather inclined to be of opinion that the lessor of the plaintiff, as executor of *Thomas Hodgson*, had a right to this rent: but we give no positive opinion upon it.

Secondly, Nor do we give any positive opinion on the second question, whether a demand were necessary before the lessor could bring his ejectment; but we are rather inclined to think that it was. That a demand is necessary where a rent is reserved with a condition of re-entry, except in the case of the King, is solemnly determined in *Borough's case*, 4 Co. 73. And I know no case to the contrary, except *Kidwelly's case*, *Plowd.* 70. which is there denied to be law. But a man may certainly distrain for a rent before any demand; and the present is a sort of a mixed case. In *Lit.* 327. and *Co. Lit.* 203. such a condition of entry as the present seems to be compared to a distress. The words of *Littleton* are, "he shall hold the land but in manner as for a distress;" and of Lord *Coke*, "that he shall take the profits in the nature of a distress." And this, I believe, occasioned the doubt at first in the case of *Jennet v. Cooles*, 1 Sid. 223; 1 Saund. 112; and 1 Lev. 170. whether an ejectment would be on such a power of re-entry: but it

(a) An estate per auter vie is not in-
 tailable within the statute de donis: the
 first taker may dispose of it by any con-
 veyance during his life, *Norton v. Frecker*,
 1 Atk. 524; *The Duke of Grafton v.*
Hanmer, 3 P. Wms. 266. n. (e); *Doe d.*
Blake v. Luxton, 6 D. & E. 289; and
Grey v. Mannock, in Chanc. Trin. Vac.
 1765, cited in 6 D. & E. 291.; or
 semb. by his will alone, *ib.* But if he do

not dispose of it, the remainder-man will
 take as a special occupant. *Norton v.*
Frecker, 1 Atk. 524; and *Lew v. Bur-*
row, 3 P. Wms. 263.—Where such an
 estate is limited to A. his heirs executors
 and administrators, on A.'s dying intes-
 tate his heir is entitled as special occu-
 pant, and consequently may retain the
 title-deeds against the administrator, *At-*
kinson v. Baker, 4 D. & E. 229.

was

was at last determined that it would (a), and the judgment given in the King's Bench was affirmed in the Exchequer-Chamber. And the lessor in this case must admit that it will, otherwise it will afford another objection against him. As therefore this seems in the nature of a penalty to take the land from the owner, though but for a time, and as an ejectment will lie against him as well in this case as in the case of a re-entry, we think that a demand is necessary (b), but give no positive opinion, being all clearly of opinion,

1744.
HASSELL
dem. HODG-
SON
against
GOWTH-
WAITE.

Upon the first question, that the lessor had no right to enter for nonpayment of the rent. Such a condition is certainly to be taken strictly, and therefore is not to be carried farther than the devisor himself has carried it. Therefore it has been holden that the lord upon an escheat cannot enter upon a condition of reentry for nonpayment of rent. And it has been always holden that powers to cut down trees, to make leases (c), or to do any thing that affects the land, must be taken strictly, and are not to be carried farther than the express words. So is the case of *Sacheveril v. Day or Dale, Latch* 163. and *Poph.* 193; and there are several other cases that are express to the same purpose. So if a rent be granted to one and his heirs, with a power for him to distrain during his life, his heirs cannot distrain, *Co. Lit.* 147. b. *Butt's case*, 7 *Co.* 24 b.

Though the intent of the testator therefore in this case had been that *Thomas Hodgson* and his executors might enter and take the profits, yet as he has not expressed it, it cannot be implied; for the condition of entry is plainly confined to the mother and daughter: but we think likewise that his intent was

(a) Vid. *Hargr. Co. Lit.* 203. a. note 3.

(b) See also *Goodright d. Hare v. Cator*, *Dougl.* 477. oct. ed.—In the case of landlord and tenant, where the former has a right to re-enter for nonpayment of rent, the legislature have relieved him from the difficulties attending a re-entry at common law, by enabling him to recover in ejectment without any formal demand if there be not a sufficient distress on the demised premises, stat. 4 Geo. 2. c. 28. s. 2. But if there be a sufficient

distress on the premises, he cannot recover in ejectment without making a demand of the rent. *Doe d. Forster v. Wandless*, 7 *D. & E.* 117.

(c) See *Goodtitle d. Clarges v. Funucan*, *Dougl.* 564; *Pomery v. Partington*, 3 *D. & E.* 665; and *Doe d. Wyndham v. Halcombe*, 7 *D. & E.* 713.; where most of the cases on this subject are collected; the result of them all is that the construction of the power is to be governed by the intention of parties.

otherwise.

1744.

HASSELL
dem. HODG-
SON
against
GOWTH-
WAITE.

otherwise. A man's intent must be collected from his words; and when a man in one part of a will or grant makes use of certain words and omits them in another part, it has always been holden that his intent must be taken to be different. Besides, it is very probable that he might intend to give such a power to his wife and daughter and not to give it to a more distant relation, much less to his nephew's executors and administrators who might be no relations at all. But it was said that then it would be hard for *Thomas Hodgson* to pay half of the renewal if he had no other remedy to recover it but by action of debt, But this receives an answer; for it being plainly a rent-charge, and so expressly called in one part of the will, he may certainly distrain for it.

As therefore we are of opinion that the executor of *Thomas Hodgson*, even taking it that he has a right to the rent, has no right of entry, the consequence is that *John Hodgson* who claims only as executor of *T. Hodgson* cannot recover in this ejectment; and therefore according to the rule, he must pay the defendant the costs of a nonsuit."

M. 18 G. 2.
Monday,
Nov. 25th.

EL. BLISSETT *against* J. HART.

[Hil. 17 GEO. 2. Rol. 762.]

In an action
by the owner
of an ancient
ferry
against a per-
son who
erects a new
ferry near to
his, the
plaintiff may
declare on
his possession;
and he need
not set forth
in his declara-
tion that
he keeps
boats and
ferry-men suf-
ficient to
carry passen-
gers over.
Bull. N. P.
76. S. C.

THIS was an action on the case.

The first count alleged that "the plaintiff on the 2d of April 1740 before was and from thence hitherto hath been and still is *seised* of a certain ancient ferry with the appurtenances commonly called *Bablock-Hitbe Ferry* upon and over the river *Isis* in the parishes of *North Moore* in the county of *Oxford* and *Appleton* in the county of *Berks* for conveying and carrying upon and over that river forwards and backwards all persons and the horses carriages and cattle of all persons having occasion for the same in boats kept by her (the plaintiff) there for that purpose, taking for the same certain reasonable freights or ferryages to wit, for every person on foot one halfpenny, for every person on horseback one penny, for every horse one penny,

penny, and for every carriage as follows, to wit, for every coach or chariot 2s. 6d., for every waggon 1s. and for every cart or chair 6d. and for every score of sheep 4d., and for all other cattle one halfpenny by the head, which said ferry has been in the form aforesaid from time whereof the memory of man is not to the contrary [and no other ferry ever was over the said river within the said parishes or either of them or near the said ferry of the said *Elizabeth*"]; Nevertheless the defendant on &c unlawfully injuriously and wrongfully erected and set up another ferry upon and over the said river near to the said ferry of the said *Elizabeth* at the parishes of *Fifield* and *North Moore* in the said counties and continued the same &c, and at divers days and times &c, and unjustly carried and conveyed in his boat a great many persons and divers horses &c &c over the same river there forward and backward near to the plaintiff's said ferry; by reason whereof the plaintiff was obliged to let her said ferry at a much less rent than she did before, and had been deprived of a great part of the profit and emolument of the said ferry, which of right belonged to her &c.

1744.
BLISSETT
against
HART.

There were five other counts in the declaration. The second only differed from the first in these two particulars, in saying that the plaintiff kept boats for carrying persons carriages and cattle, "for certain reasonable freights and ferryages" without saying what the freights were, and in omitting the words between the parenthesis in the first count.

The third and fourth counts varied from the two first in this respect, that they charged the defendant with *continuing* another ferry unlawfully erected by the defendant near the plaintiff's ferry.

The fifth count was similar to the second, except that the ferry was stated to be over the *Thames*, instead of the *Ifis*; and the sixth resembled the fifth with this difference only, that it was for *continuing* another ferry unlawfully set up by the defendant &c.

The defendant having pleaded the general issue, the cause was tried at the assizes at *Reading*, when a verdict was given for the plaintiff with one shilling damages.

1744.
BLISSETT
against
HART.

A motion was then made in arrest of judgment, and the case was twice argued, on the 16th of *April* and on the 26th of *November* 1744 by *Belfield* and *Hayward* Serjeants in support of the motion and by *Skinner* King's Serjeant and *Bootle* Serjeant contra.

Several objections were taken to the declaration. 1st, That this was a prescription against common right, and therefore should be clearly laid. That it was only stated that the plaintiff was *seised*, not that he was *seised in fee*; whereas no one can prescribe who has not an estate in fee. *Co. Lit.* 113; *Coryton v. Lithebye*. 2 *Saund.* 113; *Luttrel's case*, 4 *Co.* 86. *Aldred's case*, 9 *Co.* 57. *b. Eve v. Wright*, *Gro. Car.* 75; *Harrison v. Peck*, *Latch* 110; *Cowper v. Andrews*, *Hob.* 39; *Scoble v. Skelton*, 2 *Mod.* 318; 2 *Show.* 195; and *Skin.* 36.

2dly, That there must be some valuable consideration to support such a toll, such as repairing &c. *Farmer v. Brook*, *Owen* 67; 1 *Leon.* 142, 3; *Ball v. Collis*, 3 *Bulstr.* 61; 17 *Vin. Abr.* title "*Prescription*", B. 259. But no consideration is here set forth.

3dly, It ought to be a reasonable toll, *Savile* 14.: whereas here the tolls were unreasonable; 2 s. 6 d. for a coach or chariot, and only 1 s. for a waggon; and that the prescription here laid could not be supported, because there were no chariots or coaches before the time of *Queen Elizabeth*.

4thly, That it should have been averred in the declaration that the plaintiff kept boats and ferrymen sufficient to carry goods and passengers over the river; and that the want of this averment was not aided by the verdict.

On the part of the plaintiff it was answered,

1st, That it was sufficient for the plaintiff to declare on his possession only without stating a seisin in fee; this being an action against a wrong-doer for disturbing the plaintiff in his right, and not an action for the toll or duty. That actions for diverting watercourses, for stopping up lights, for disturbing rights of common, and for rights of way were founded on possession, *Strode v. Byrt*, 4 *Mod.* 418; *Hobblethwaite v. Palmes*, 3 *Mod.* 48; *Anon.* 1 *Ventr.* 248; and *Saunders v. Williams*, *ib.* 319. And that in an action for not grinding at the plaintiff's mill it was sufficient to state that the plaintiff "had and ought to have toll"

toll" &c, *Chapman v. Flexman*, 2 *Ventr.* 291. So in the case of erecting a new market, it is sufficient to allege that the plaintiff "hath and ought to have a market and toll" &c. *Yard v. Ford*, 2 *Saund.* 172; *Robinson's Entr.* 51.

1744.
BLISSETT
against
HART.

2dly, That it is not necessary to set forth any consideration. 2 *Brownl. and Goldesb.* 177; and *Foster v. Holyman*, 1 *Lev.* 103.

3dly, That there was nothing unreasonable in the claim of tolls as set forth; and that the rates being stated after a videlicet it was not necessary to prove them as laid. *Stapleton v. Morfe*, *Cro. Eliz.* 798. And with regard to coaches being of modern invention, it was sufficient to say that the facts constituting the prescription are found by the jury (a).

4thly, That in fact it was sufficiently averred that the plaintiff kept boats &c, "boats kept by her (the plaintiff) for that purpose;" that if not, the want of such an averment, if necessary, was aided by the verdict; and that in such an action as this it was not even necessary to make such an averment at all. That this was not like the case of a mere private right. That though such an averment was to be found in some of the precedents of declarations of this kind, the greater number of precedents was without it. *Raft.* 9. b; 1 *Brown's Entr.* 68, 9; *Robins. Entr.* 51; *Hearn* 101, 190; 11 *Hen.* 4. 82, 83; *pl.* 28; *Harbin v. Green*, *Hob.* 189; *Vinkersterne v. Ebdon*, 1 *Ld. Raym.* 384; *Buxton v. Bateman*, 1 *Sid.* 88; 203; 1 *Keb.* 386; 457; *Hall v. Wiseman*, *Dyer* 117. a. and *Stedman v. Hay*, *Com. Rep.* 366. And that the defendant might indict the plaintiff for not keeping a sufficient number of boats &c, this being a right of a public nature, or he might bring an action against him for damages if he had sustained any particular injury, 2 *Brownl. & Goldesb.* 180; *Payne v. Partridge*, *Salk.* 12; and *Carth.* 191.

The Court over-ruled all the objections but the last on the first argument. The second argument was directed for the single point only, whether it were necessary to aver in the declaration that the plaintiff kept boats and ferrymen sufficient to carry goods and passengers over the river; and on the second argu-

(a) Vid. *Chichester v. Lethbridge*, *E.* 11 *Geo.* 2. *sup.* 72, 73.

1744.
BLISSETT
against
HART.

ment this objection was also over-ruled. The Court therefore discharged the rule for arresting the judgment.

Judgment for the plaintiff (a).

(a) The reasons given by the Court for the opinion they entertained do not appear in Lord Chief Justice Willes's papers: but the following note is taken from Mr. J. Abney's note book.

"By the Court. A ferry is publici juris. It is a franchise that no one can erect without a license from the crown: and when one is erected, another cannot be erected without an ad quod damnum. If a second is erected without a license, the crown has a remedy by a quo warranto, and the former grantee has a remedy by action (1). But what profits it yielded and what repair it was in were proper for the consideration of the jury to found their damages upon. The county cannot change a bridge or highway from one place to another. 6 Mod. 307; 2 Inst. 701. The franchise is the ground of the

action. Bro. Abr. "Action on the Case," pl. 14; 42; 57. In case of erecting a new market or ferry to my nuisance, I may have an assize of nuisance or an action on the case. If the ferry be not well repaired, it is popular, and in nature of a highway (2), and no action lies without special damage by reason of the infinity of suits: but it is to be reformed by presentment or information at the suit of the crown. This differs from the cases of mills, bakehouses &c, which are grounded on customs and of a private nature; and this declaration is good without an averment of the sufficiency of the ferry.— And the plaintiff had judgment.

N. B. The Court rather inclined to conceive that, if the averment had been necessary, the verdict had not cured it." —MS. Abney J.

(1) But the owner of a ferry from A. to B. cannot prevent persons going in the boats of any other person from A. directly to C., though C. lie near to B., provided it be not done fraudulently and as a pretence for avoiding the regular ferry. *Tripp v. Frank*, 4 D. & E. 666.

(2) Vid. Bro. Abr. tit. "Action on the Case," pl. 93.—But in the case of a county bridge, no action can be maintained by an individual against the inhabitants of a county, though he sustain a particular injury in consequence of the bridge being out of repair. *Russell v. The Men of Devon*, 2 D. & E. 667; *Vaugh.* 340.

M. 18 G. 2.
Wednesday,
Nov. 28th.

NATHANIEL SIMPSON against CHIVERTON HARTOPP.

[Hil. 16 GEO. 2. Rol. 1260.]

Implements
of trade are
privileged
from distress
for rent, if
they be in
actual use at
the time, or
if there be

THE opinion of the Court was delivered, as follows, by

Willes, Lord Chief Justice. "Trover. This comes before the Court on a special verdict found at the *Leicester* assizes, held at *Leicester* on the 3d of August 1743.

any other sufficient distress on the premises.

But if they be not in actual use, and if there be no other sufficient distress on the premises, then they may be distrained for rent.

1744.
 SIMPSON
 against
 HARTOPP.

defendant entered in the said messuage and tenement, and then and there seized the said stocking-frame on the said premises as a distress for the said rent so in arrear, as the said *John Armstrong's* apprentice was then weaving a stocking on the same frame. And that the defendant (though often requested) hath refused to deliver the said stocking-frame to the said plaintiff, and continues to detain the same. The special verdict concludes, as usual, by submitting the matter to the opinion of the Court whether the said stocking-frame was by law distrainable for the said arrears of rent or not; and if the Court should be of opinion that it was not, they assess the damages of the plaintiff at 8 l. &c.

Upon this special verdict three questions (a) arise,

First, Whether a stocking-frame has any privilege at all, as being an instrument of trade; or whether it be generally distrainable for rent as other goods are, even though there was sufficient distress besides.

Secondly, Though it may be so far privileged as not to be distrainable if there be no other goods sufficient, yet whether or not it may not be distrained if there be not sufficient distress besides.

Thirdly, Though it be distrainable either in the one case or the other when it is not in actual use, yet whether or no it has not a particular privilege by being actually in use at the time of the distress, as the present case is.

I shall but touch upon the two first questions, because they are not the present case; but yet it may be proper to consider them a little, to introduce the third, which is the very case now in question.

There are five sorts of things which at common law were not distrainable;

1st, Things annexed to the freehold.

2d, Things delivered to a person exercising a public trade to be carried wrought worked up or managed in the way of his trade or employ.

(a) The case was twice argued; on Monday February 6th, 1743, 4, and Thursday, May 31st, 1744, by *Prime King's* Serjt. and *Bootle Serjt.* for the plaintiff, and by *Skinner* and *Willes King's* Serjts. for the defendant.

3d, Cocks or sheaves of corn.

4th, Beasts of the plough and instruments of husbandry.

5th, The instruments of a man's trade or profession.

The first three sorts were absolutely free from distress, and could not be distrained, even though there were no other goods besides.

The two last are only exempt sub modo, that is upon a supposition that there is sufficient distress besides.

Things annexed to the freehold (a) as furnaces, millstones, chimney-pieces, and the like, cannot be distrained, because they cannot be taken away without doing damage to the freehold, which the law will not allow.

Things sent or delivered to a person exercising a trade, to be carried wrought or manufactured in the way of his trade, as a horse in a smith's shop (b), materials sent to a weaver, or cloth to a taylor to be made up, are privileged for the sake of trade and commerce, which could not be carried on if such things under these circumstances could be distrained for rent due from the person in whose custody they are.

Cocks and sheaves of corn were not distrainable before the statute 2 W. & M. c. 5., (which was made in favor of landlords), because they could not be restored again in the same plight and condition that they were before upon a replevin, but must necessarily be damaged by being removed.

Beasts of the plough &c were not distrainable (c), in favor of husbandry (which is of so great advantage to the nation,) and likewise because a man should not be left quite destitute of getting a living for himself and his family. And the same reasons hold in the case of the instruments of a man's trade or profession.

But these two last are not privileged in case there is distress enough besides; otherwise they may be distrained.

These rules are laid down and fully explained in *Co. Lit.* 47. a. b. and many other books which are there cited; and there

(a) Vid. *Nibley v. Smith*, 4 D. & E. 504.

(b) Or brought into a common inn. Bro. "*Distress*," pl. 57. But a carriage at a livery stable is not privileged from distress for rent by the lessor. *Francis v. Wyatt*, 1 Bl. Rep. 483; 3 Burr. 1498.

(c) But they may be distrained for non-payment of the poor-rates, though there be other goods sufficient to answer the demand, such a distress being in the nature of an execution. *Hutchins v. Chambers*, 1 Burr. 579.

1744.
 SIMPSON
 against
 HARTOPP.

are many subsequent cases in which the same doctrine is established, and which I do not mention because I do not know any one case to the contrary.

From what I have said on this head, the second question is likewise answered; for as the stocking-frame in the present case could only be privileged as it was an instrument of trade, we think that it might have been distrained if it had not been actually in use, it being found that there was not sufficient distress besides (a). These are the words in *Cartb.* 358. in the case of *Vinkinstone v. Ebdon*, "the very implements of trade may be distrained if no other distress can be taken."

But whether or no this stocking-frame's being actually in use at the time of the distress gives any further privilege is the third and principal question in the present case. And we are all of opinion that upon this account it could not be distrained for rent for these two plain reasons;

1st, Because it could not be restored again upon a replevin in the same plight and condition as it was, but must be damnified in removing, for the weaving of the stocking would at least be stopped if not quite spoiled, which is the very reason of the case of corn in cocks &c;

2dly, Whilst it is in the custody of any person and used by him, it is a breach of the peace to take it. And these are two such plain and strong reasons that even if it were quite a new case I should venture to determine it without any authority at all; but I think that there are several cases and authorities which confirm this opinion.

It is expressly said in *Co. Lit.* 47. a. that a horse whilst a man is riding upon him (b), or an axe in a man's hand cutting wood, and the like cannot be distrained for rent. In *Bracton* and several other old books there is a distinction made between catalla otiosa and things which are in use. It was held in *P.* 14 *H.* 8. *pl.* 6. that if a man has two millstones and only one is in use, and the other lies by not used, it may be distrained for rent. In *Read's* case, *Cro. Eliz.* 549. it was holden that yarn carrying on a man's shoulders to be weighed could not be distrained any

(a) *Gorton v. Falkner*, 4 *D. & E.* 565. (b) *Storey v. Robinson*, 6 *D. & E.* 138. S. P. more

more than a net in a man's hand, or a horse on which a man is riding. So in *Moor 214, The Viscountess of Bindon's case*, it is said that if a man be riding on a horse the horse cannot be distrained, but if he hath another horse on which he rides sometimes, this spare horse may be distrained.

1744.
SIMPSON
against
HARTOPP.

I could cite many other cases to the same purpose, but I think that these are sufficient to support a point which has so strong a foundation in reason, especially since there is but one case which seems to look the contrary way, which is the case of *Webb v. Bell*, 1 Sid. 440., where it was holden that two horses and the harness fastened to a cart laden with corn might be distrained for rent. But in the first place I am not clear that this case is law; and besides it is expressly said in that case that a horse upon which a man was riding cannot be distrained for rent; and therefore a quære is made whether if a man had been on the cart the whole had not been privileged, which is sufficient for the present purpose, it being found that the stocking-frame was to be in the actual use of a man at the time when it was distrained.

For these reasons, and upon the strength of these authorities, we are all of opinion that this stocking-frame, the apprentice being actually weaving a stocking upon it at the time when it was distrained, was not distrainable for rent, even though there were no other distress on the premises; and therefore judgment must be for the plaintiff. (a)"

(a) This case was cited and relied upon by Mr. J. Buller in *Gorton v. Falkner*, 4 D. & E. 563.—See the cases of *Davies v. Powell*, Hil. 11 Geo. 2. sup. 46; and *Eaton v. Southby*, Hil. 12 Geo. 2. sup. 136.

HUNTER *against* FRENCH and Others.

H. 18 G. 2.
Tuesday,
Jan. 29th.

"NOT being well, I did not go to *Westminster*,

But my Brothers *Abney* and *Burnett* gave judgment in this case for the plaintiff, the point reserved being given up by the defendant.

An allegation in a declaration (for a malicious prosecution) that the plaintiff "by a jury of the

said county &c was duly and in a lawful manner acquitted" is proved by the production of the record by which it appeared that the jury found the plaintiff not guilty, and upon that judgment was entered that the plaintiff should go thereof acquitted.

1744, 5.

HUNTER
against
FRENCH.

The case was spoken to on the 22d of *November* last by *Prime Serjt.* for the plaintiff, and *Bootle Serjt.* for the defendant; and is as follows.

It was an action on the case for a malicious prosecution; wherein the plaintiff in the usual form sets forth that the defendant caused him to be indicted for perjury, and that he falsely and maliciously caused the said indictment to be presented against the plaintiff, and such proceedings were thereupon had that afterwards to wit at the sessions of our lord the King of oyer and terminer held at the castle of *York* in and for the county of *York* on *Monday* the 18th day of *July* in the 17th year of his present Majesty before *Thomas Denison Esq.* one of the justices assigned to hold pleas before the King himself *Thomas Birch Esq.* one of his Majesty's serjeants at law and their associates &c the said *Thomas Hunter* (the plaintiff) by a jury of the said county of *York* was duly and in a lawful manner acquitted of the premises in the said indictment specified; Damage 500*l.* Verdict for the plaintiff for 200*l.*

And a case was reserved for the opinion of this Court upon this point, whether the record of acquittal produced in evidence proved the plaintiff's declaration as laid. The evidence produced was a copy of the record of acquittal, whereby it appeared that the jury found the present plaintiff not guilty, and that upon that verdict the judgment of the Court was entered that the present plaintiff should go thereof acquitted.

Bootle Serjt. for the defendant objected that the acquittal is by the court and not by the jury; and it appears by the evidence that the plaintiff in the present case was so acquitted; and that therefore he ought to have set it forth that he was acquitted by the judgment of the Court and not that he was acquitted by the jury, as he has done. For that the jury only find a person guilty or not guilty of the fact, and then the Court passes the sentence, till which time the party cannot legally be said to be acquitted. He insisted that all the precedents are in this manner, that the party was acquitted by the Court, and not one that he was acquitted by the jury. And he cited *Stroud v. Lady Gerrard*; *Salk.* 8; *Wentworth v. Wentworth*; *Cro.*

Cro. Eliz. 452; *Francis Throgmorton's case*, *Cro. Eliz.* 563; and 2 *Hale's Hist. of the Pleas of the Crown* 243, where it is said that there must not only be an acquittal by a verdict but a judgment thereupon quod eat fine die; for the bare verdict of his former acquittal is not a sufficient bar without a judgment pleaded also; and ditto 306. [But, on looking into that, it plainly appears to relate only to verdicts in civil actions. Vide 14 *Hen.* 7. c. 30. there cited]. He also cited 1 *Ld. Raym.* 376. *Saville v. Roberts* where the record is set forth at large, and it is there said that the party debito modo secundum legem et consuetudines regni Angliæ inde acquietatus fuit, prout patet per recordum &c; which shews that the same, as reported in *Salk.* 13., is mistaken; for it is there said that the record was et fuit inde per veredictum juratorum acquietatus, which (he said) was the only book where any such entry could be found.

1744, 5.

HUNTER
against
FRENCH.

Prime Serjt., on the other side, insisted that the entry was right; that a man might be properly said to be acquitted by a jury, as he undoubtedly may be said to be convicted by the verdict; that the judgment was the necessary consequence, and could not be refused ex debito justitiæ in a criminal case when the party was acquitted by a jury, for that no new trial could be granted; which we agreed. If this were not so, he said that the words "by a jury of the said county of York" ought to be rejected, and then it would be well enough according to the precedent in *Lord Raymond*; and the evidence shewed that he was duly acquitted by verdict and judgment of the court thereupon. And he cited 2 *Inst.* 385. on *Westm.* 2. c. 12. *Co. Entr.* 25. b. *Thomp's Entr.* 43. pl. 64. *Winch's Entr.* 74. *Trem. P. C.* 286, 289. *Clift's Entr.* 29. *Herne's Plead.* 88. 2 *Hawk. P. C.* 199, 200. *Hale's Hist. P. C.* 1 vol. 560, and 2 vol. 64, 300, 301, 2, 4, and 5; and *Cowell's Interpreter*.

My Brother *Abney* was of opinion that it was well enough; for that the words "by a jury &c" might be rejected.

My Brother *Burnett* thought that they could not be rejected; but that a man might properly be said to be acquitted by the jury at least; that it is sufficient to say that a party is duly and in

1744, 5.

HUNTER
against
FRENCH.

in a lawful manner acquitted by the jury (a). And he took notice where express malice is necessary to be proved in these actions, and where not; that where a person is acquitted by a jury malice need not be proved at first on the part of the plaintiff, but it is incumbent on the defendant to shew on the other side that there was a probable cause (b): but that where the indictment is quashed, it is necessary for the plaintiff to prove express malice; and this distinction he said would reconcile all the differences in respect to this matter.

I was of opinion that the words "by a jury &c" could not be rejected; they appearing from what my Brother *Burnett* said to be very material words. I doubted whether a man could properly be said in a legal sense to be acquitted by the jury; as the jury do not acquit him of the crime, but only find him not guilty of the facts, and then the Court acquits him of the crime. But I was clearly of opinion that the acquittal was sufficiently laid in the declaration; for I thought that the words might fairly be construed in this manner, that he was duly acquitted by the jury and in a lawful manner acquitted, and then it would be very well according to the precedent in Lord *Raymond*; to which construction my Brother *Burnett* agreed.

(a) In an action for a malicious prosecution the plaintiff must allege that the prosecution is determined. *Arundell v. Tregon, Yelv. 117*; *Lewis v. Farrel, 1 Str. 114*; *Fisher v. Bristow, Dougl. 215*. So in an action for a malicious commitment on a charge of felony. *Morgan v. Hughes, 2 Durnf. & E. 225*. In such a case stating that the plaintiff was discharged from his imprisonment is not sufficient. *Ib.* So in actions for maliciously holding to bail. *Parker v. Langley, Gilb. Cas. in Equ. 163*; *10 Mod. 145, 209*.—Entering a noli prosequi by the Attorney General is not a termination of the prosecution so as to enable the party accused to bring an action for a malicious prosecution, because new process may still issue on the same indictment. *Goddard v. Smith, 6 Mod. 261*.

(b) Malice and the want of probable cause must both concur to support an ac-

tion for a malicious prosecution. Malice may be implied from the want of probable cause, but not *è converso*. *Sutton v. Johnstone, 1 D. & E. 545*.—An action will lie for a malicious prosecution, though the indictment be defective and cannot be supported in law. *Jones v. Gwinne, Gilb. Cas. in Equ. 201, 210, 221*; and *10 Mod. 217*; *Chambers v. Robinson, 2 Str. 691*; and *Wicks v. Fentham, 4 D. & E. 247*.—But no action can be maintained for a malicious prosecution before a court martial for an offence cognizable by that Court; nor for delaying to bring an officer under arrest to a court martial, it being a military offence. *Sutton v. Johnstone, 1 D. & E. 493*.—Nor can such an action be maintained against an officer in the army for an improper exercise of his power *flagrante bello* and out of the kingdom. *Barwis v. Keppel, 2 Wils. 314*.

However

However the matter was ordered to be spoken to again: but, as I said before, upon its coming on this day, the counsel for the defendant declined speaking to it;

1744, 5.
HUNTER
against
FRENCH.

So judgment for the plaintiff according to the rule."

JOHN GOTT and MARY his Wife *against* HENRY ATKINSON Son and Heir of HENRY ATKINSON of OTLEY Esq. deceased, WILLIAM VAVASOR, THOMAS MICKLETHWAYTE, and HENRY ATKINSON of LEEDS, Devisees of certain Lands of the said HENRY ATKINSON.

H. 18 Geo. 2.
Monday,
Feb. 4th.

"DEBT. The plaintiff declares on a bond dated the 1st of November 1737, whereby *Henry Atkinson* deceased became bound to the plaintiff *Mary* when sole in 200 £ and bound himself and his heirs; and he lays his damage at 10 £.

A devisee of all the devisor's lands &c, in trust to sell and pay all the devisor's debts, &c cannot be sued under the stat. 3 & 4 W. & M. c. 14. Barnes 164. S. C.

The defendant *Henry Atkinson* (being an infant) by his guardian pleads *riens per discent* (a); and the plaintiffs pray judgment against him of *assets cum acciderint*.

The defendants *William Vavasor* and *Henry Atkinson*, two of the devisees, plead that the testator died seised of divers lands and tenements in the county of *York* to the value of the debt; and that in his life-time, on the 21st of *August* 1743, he made his will and gave to the defendants *William Vavasor* *Thomas Micklethwayte* and *Henry Atkinson* all his messuages lands and tenements which he had any power to dispose of by his will &c and all his goods and chattels and other personal estate whatsoever upon this special trust and confidence, that in such convenient time after his death as to them should seem proper they should sell and dispose of such his messuages &c and also all his goods &c for as much money as could be reasonably got

(a) If the heir pay his ancestor's debts to the value of the land descended, he may hold the land discharged from the other debts of the ancestor. *Buckley v. Nightingale*, 1 Str. 665.—But he cannot plead

that he claims to retain a certain sum for money laid out in repairing the premises descended. *Shetelworth v. Neville*, 1 D. & E. 454.

1744, 5.

GOTT
against
ATKINSON.

for the same, and that the said three defendants should pay and apply the money arising by such sales in payment of his just debts and funeral expences; and if it should happen that any surplus should remain after all his just debts and funeral expences paid and satisfied, then upon this further trust that the said defendants should pay over the same to his dear and loving wife *Elizabeth Atkinson*, to whom he gave and bequeathed such surplus money; and he gave his said trustees power to deduct out of the money so raised their charges and expences in the execution of the said trust. That the said *Henry Atkinson* died on the same day, and that at the time of his death there were divers other creditors of the intestate, as well upon bond as upon simple contract, besides the plaintiffs; and that at the time of suing out the original writ, nor at any time before or since, the said defendants are not and were not devisees of any lands &c of the said testator otherwise than upon the trusts and for the purposes aforesaid; and that those which were devised to them all remain unsold; and this they are ready to verify; wherefore &c.

The other defendant *Thomas Micklethwayte* pleads, and says that he cannot deny the action of the plaintiffs, nor that the bond is the deed of the testator, but that the deviser in his lifetime made his will as aforesaid, and sets forth the same as in the other plea, only omitting the devise of the surplus to his wife; and says that he never entered into the lands &c devised to him and the other defendants in trust, but has totally refused to accept of the trust, and has not at all intermeddled therewith; and this he is ready to verify &c; wherefore he prays judgment whether he ought to be charged with the said debt by virtue of the said bond, except in the said messuages &c so as aforesaid devised to the said three defendants.

The plaintiffs pray judgment against the defendant *Micklethwayte* of their debt and damages to be levied of the said messuages &c so devised as aforesaid.

And they demur to the plea of the other two defendants; and for causes of demurrer shew that the plea is pleaded in bar of the action, whereas it ought to have been pleaded in bar of the execution

execution of the judgment for the debt and damages on any other lands or tenements or in any other manner than on the lands and tenements in the plea mentioned, and for that the lands and tenements so mentioned and devised are not particularly specified or described; nor have they confessed or acknowledged any lands or tenements devised whereof the devisor died seised in fee, nor in what place or places, county, or counties, the same or any of them lie.

1744, 5.

GOTT
against
ATKINSON.

The said two defendants join in demurrer; and upon this demurrer it came before the Court.

Draper Serjt. for the plaintiff insisted that this was not a plea to the action, because the bond is admitted. And for this purpose he cited *Carth.* 353, 354, and 5 *Mod.* 119. *Redshaw v. Hesther*. But these are quite to another purpose. He insisted also that the lands and tenements confessed ought to have been particularly described, and where the same lay, that the plaintiff might be informed how to take out execution against them. He said that this was also held to be necessary in the case of an action against an heir; and that it was said in the seventh section of the stat. 3 & 4 *W. & M. c.* 14., that the devisees should be chargeable just in the same manner as the heir. And he insisted that this case was plainly within sect. 2. of that statute, entitled "an act for relief of creditors against fraudulent devises;" the words being very general, "that all wills &c shall be deemed and taken to be fraudulent and void against the creditor or creditors of the devisor."

Bootle Serjt. for the defendants insisted that this was a good plea in bar of the action, for that the defendants as devisees were not liable to any such action at common law; and if therefore they were not within the statute, no such action would lie against them. He said they were plainly not within the statute; for taking it that they were within the words and intent of the second clause, which he did not admit, they were excepted out of it by the fourth section; the words of which are "that where there shall be any devise or disposition &c of any lands &c for the raising or payment of any real or just-debt or debts, or any portion or portions sum

1744, 5.

GOTT
against
ATKINSON.

or sums of money for any child or children of any person other than the heir at law in pursuance of any marriage contract or agreement in writing made bonâ fide before such marriage, the same and every of them shall be in full force; and the lands &c shall be held and enjoyed by the devisee or devisees for such estate or interest as shall be limited or devised until such debt or debts portion or portions shall be raised paid and satisfied." He admitted that if the case were within the statute, the objection that the lands &c were not particularly described would have been good; but he relied upon it that the case was not within the statute.

I WAS rather inclined to be of opinion that the case would have been within the second section of the statute, if it had not been excepted, the words of the clause being very general. But I was clearly of opinion that it was within the exception; that therefore this action would not lie, and consequently that the plea was a good plea to the action; for though the bond was admitted, it was not admitted that any action lay upon it against these defendants, but expressly denied.

As the exception is worded, if there had been a devise for the payment of any particular debt upon simple contract, it would have been a good devise even against the plaintiffs, though bond creditors; much more when the devise is for the payment of all the testator's just debts, and consequently the plaintiff's among the rest. Though the law indeed is otherwise, it is most equitable that all a man's just debts should be paid equally; and whenever there are equitable assets, a Court of Equity always distributes them equally amongst all the creditors. But to let the plaintiffs prevail in this action, would be quite to overturn the intent of the deviser and to give the plaintiffs a preference over the rest of his creditors in respect to the lands devised. And as to what was said by *Draper* that by this mean the plaintiffs would be without remedy, it receives this plain answer, that they have the same remedy as the rest of the creditors by a bill in Equity. If this had been a case within the statute, I was clearly of opinion that the other objection, that the lands were not particularly described, would have been a fatal objection; the statute plainly putting a devisee on the same foot

as the heir; and it has been often holden to be a good objection in such an action brought against the heir.

1744, 5.

GOTT
against
ATKINSON.

Mr. J. Abney, and Mr. J. Burnett, were of the same opinion.

So judgment was given against the plaintiffs for these two defendants; and the counsel for the plaintiffs did not chuse to enter up any judgment against the defendant *Micklethwayte* upon his plea, but contented themselves with taking judgment against the infant heir cum affets acciderint."

WINIFRED JACKSON *against* THOMAS SHARP.

H. 18 Geo. 2.
Tuesday,
Feb. 5th.

"CASE. The action is brought for a malicious prosecution (a); in which an indictment (b) is set forth in the declaration found at the session of oyer and terminer for the city of *London* held at the *Old Bailey* on the 14th of *January* 16 Geo. 2.: but the plaintiff does not set forth the indictment in hæc verba, but only says that the jurors by the said indictment upon their oath did present; and then sets forth four *East India* bonds specified in the indictment, and (inter alia) in setting forth the first bond saith with interest for the same as therein WAS mentioned; and in setting forth the second third and fourth saith with such interest for the same as IS therein also mentioned; and afterwards it is set forth that the *East India* Company having on the 21st day of *June* in the year 1729 given due and public notice in the *London Gazette* for the payment and discharge of the first of the before mentioned bonds, such bond by virtue and according to the tenor of such notice ceased to carry any farther interest from and after the 31st day of *December* then next ensuing; and it is set forth in the same manner in respect to the three other bonds, only the notices and times ceasing of payment were laid upon different days, but the word *then* next ensuing is made use of in the same manner. And the plaintiff lays her damage at 3000*l*.

In an action for a malicious prosecution in charging the plaintiff with conspiring with others to defraud the defendant of the interest of an *East India* bond, the declaration stated that the bond bore interest "as therein is (not was) mentioned," and held good.

(a) See *Hunter v. French*, *sup.* 517.

(b) It was an indictment against the plaintiff and three other persons for a con-

spiracy to cheat and defraud the defendant.

1744, 5.

JACKSON
against
SHUTE.

A verdict was given for the plaintiff; damages 100*l*. And a case was reserved for the opinion of the Court whether the indictment produced in evidence supported the declaration; and upon this case it came before the Court.

Skinner Serjt. for the plaintiff. *Prime* Serjt. for the defendant.

The only objections were,

1st, That in setting forth the three last bonds the plaintiff should have said *was* and not *is*; both the bonds and indictment being of a time past.

2^{dly}, That the words *then next* must relate to the 31st of *December* next after the indictment, and not the 31st of *December* next after the notice; and if so, the declaration varies from the indictment.

To support these objections *Prime* Serjt. insisted that it did not appear that the bonds did still subsist; and if not, it could not be said of them "as *is* therein mentioned." And he cited the case of *Dr. Drake* reported in *Salk.* 660, and in the reports of Lord *Holt's* time 350, where upon a special verdict judgment was given for the defendant, because the word *nor* was in the information and the word was *not* in the libel. But that case is very different from the present, because that was an information for a libel, and it set forth that the defendant did make a libel, in which libel were contained divers scandalous matters *secundum tenorem sequentem*, which was held to be the same as setting forth the libel in *hæc verba*, which formerly was thought necessary to be done, though of late it has been several times determined otherwise, and it is now a settled point that it is not. He cited likewise *Dyer* 299, 300, where the demise being laid to be by a person in the life time of his father, whose heir he was, though his father was dead at the time of bringing the ejectment, was held not to be good. And the case of *Wanderburg &c v. Blake*, where in an information "*pro domino protectore*," without saying "*pro domino protectore et seipso*," was held not sufficient. And the case of *Bonner v. Walker*, *Cro. Eliz.* 524, where the issue in replevin was whether the place where &c was the freehold of the avowant, and it was found by the special verdict that it was the freehold of the avowant's wife,

wife, and the Court were of opinion against the avowant; for when he says it was his freehold, it must be intended to be his sole freehold and in his own right. And the case of *Odell v. Moreton Cro. Jac.* 254, where upon a writ of error from a judgment in *Durham* the writ of error was holden not to be good, because it recited a judgment before the Bishop and eight Justices, whereas the judgment removed appeared to be before the Bishop and nine Justices, viz. one Sir *H. Linley* who was not mentioned in the writ of error. He also cited the case of *Sherley v. Underhill*, where a writ of error was holden not to be good, (but was amended) because it recited a record between *George Sherley* Knight and Baronet and *Underhill*, whereas by the record it appeared that *Sherley* was only a Baronet and not a Knight. And *Strange v. Greenhil*, 2. *Lev.* 166. where upon a demurrer in debt on a bond quantoginta was holden to be an impossible word in the declaration. And the case of *Bucksom v. Hoskins*, *Salk.* 52.; but this is but an insensible case, and so far as it is to be understood is rather an authority against the defendant. And the case of the *Queen v. Ewer*, 2 *Lord Raym.* 756, where judgment upon a demurrer was given for the defendant in a scire facias brought on a recognizance, because there was a material variance between the scire facias and the recognizance. And the same book 1170, reported likewise in *Salk.* 660., where a writ of error was quashed between *Darby v. Anely*, because there was a material variance between the record recited in the writ of error and the record returned. And the case of *Chetley v. Wood*, *Salk.* 659, where the plaintiff declaring on a recognizance and not setting it forth right, on noli tuel record pleaded judgment was given for the defendant.

1744, 5.

JACKSON
against
SHARP.

But we were all clearly of another opinion, and thought that the cases cited by *Prime* were not at all parallel to the present case.

We thought that, speaking of a thing past which still exists, it may very properly be said *was* and *is*, as in the case of a custom; and that therefore either of the words might be made use of in the present case. As to what was said, that it does not appear that this bond is still in being, it must be taken to exist at the time of the indictment found, otherwise the grand jury

1744, 5.

JACKSON
against
SHARP.

could not have found it; and that is enough for the present purpose, the declaration in this respect being in the very words of the indictment.

And so is the declaration in the other places, where the objection is taken to the word *then*. And we were all of opinion that the word "then" must relate to the time of the notice, being the proximum antecedens; and that the objection would have been much stronger, if the word "then" had been omitted. The declaration in the present case does not set forth the indictment in hæc verba (a), nor secundum tenorem sequentem; so the case of the *Queen v. Drake* is in no wise parallel to this.

We therefore over-ruled the objections; and judgment was given for the plaintiff."

(a) In *R. v. May, Dougl.* 193. it was holden that the words (in an indictment for perjury committed on the trial of an indictment for an assault) "in manner and form following, that is to say," did not bind the party to recite the former indictment verbatim, nor render the omission of the word "despaired" fatal.

H. 18 Geo. 2.
Wednesday,
Feb. 6th.

A precept out of an inferior court "to attach or distrain" the goods of the defendant, to compel his appearance, is good.

—The proceedings of an inferior court may be pleaded by "taliter processum est"

&c in the case of officers of the court; and in the case of the party also. Semb.

—If it be stated in a plea that a precept issued

out of an inferior court, it will be taken that it was issued by the Judge of that court.

JOHNSON *against* WARNER and Another.

TRESPASS for breaking and entering the plaintiff's house at *Bradley* in the county of *Derby*, and taking and carrying away divers goods and chattels belonging to the plaintiff.

The defendants pleaded not guilty to all the trespasses, except the breaking and entering the house and taking the goods; and as to that they pleaded two justifications, respecting two several parts of the goods specified in the declaration.

As to the breaking and entering of the house and taking some of the goods, (specifying which), they pleaded that the Honor of *Tutbury* in the counties of *Stafford* and *Derby* was an immemorial honor and parcel of the Duchy of *Lancaster*; that at the Court Baron of the King of the Honor of *Tutbury* holden on the 18th of *January* 1742 before *W. Ward, J. Dean, D. Astle*, and *P. Warner*, suitors of the said Court one *W. Hall* levied his plaint

against

against the now plaintiff in a plea of trespass on the case to the damage of *Hall* of 39 s. 11 d. for a cause of action arising within the jurisdiction of the said Court; and thereupon such proceedings were had in the said Court &c that afterwards at the Court Baron of the said Honor holden on the 8th of February 1742 before *W. Ward* &c &c suitors &c there issued out of the said Court a certain precept in writing directed to the two defendants bailiffs of the said Honor and ministers of the said Court, commanding them to *attach OR distrain* the plaintiff by his goods and chattels within the said Honor so that he might be and appear at the then next court on the 1st of *March* then next to answer the said *Hall* &c; that the precept was delivered to the defendants to be executed, by virtue whereof they entered the said house, being within the jurisdiction of the Court, and attached took and carried away the said goods for the cause aforesaid; that the defendants at the next court holden on the 1st of *March* returned the said precept served and executed; and that the plaintiff had not yet appeared to the said plaint in the said Court.

1744, 5.
JOHNSON
against
WARNER.

And as to taking away the residue of the goods (mentioning them,) they justified under a similar precept directed to them, which was issued out of the hundred Court of *Appletree* holden at *Sudbury* before the Steward of that Court.

To this plea there was a general demurrer.

Belfield Serjt. for the plaintiff took several objections to the plea.

1st, The second part of the justification under the precept from the hundred Court is bad, for that gives no answer to the breaking of the house; and that part of the trespass being unanswered, there is a discontinuance, 1 *Rol. Rep.* 135. 176.

2dly, Both the precepts are bad, being in the disjunctive to "attach *or* distrain," and therefore uncertain and void. An attachment and distress are of a different nature; the former alters the property of the goods, the latter does not. And besides an attachment does not lie in inferior courts. 1 *Bulstr.* 52; *Yelv.* 194; *Cro. Jac.* 255; 1 *Rol. Abr.* 780.

6 T

3dly,

1744. 5.

JOHNSON
against
WARNER.

3dly, The precepts are too general; they are to attach the plaintiff by his goods and chattels generally. But these distresses are only in the nature of a notice, to compel an appearance.

4thly, A *taliter processum est* in inferior courts is not sufficient; all the proceedings ought to be set out. *Sir T. Jon.* 129; 2 *Lutw.* 1413.

5thly, No place or vill is here alleged where the cause arose within the jurisdiction.

6thly, It is not said by whom the precepts were issued, whether by the suitors or the steward.

Draper Serjt., in answer to the first objection, said that only one breaking was alleged in the declaration, and one was justified, which was sufficient.

2dly, An attachment against the goods is the first process in actions of trespass on the case; it is only to compel an appearance, and is in the nature of a summons. *Dalt. Sher. c.* 31, 32. *p.* 152, 3. *Finch.* 545, 6. In the superior courts goods attached are forfeited and may be sold, but in inferior courts they cannot be sold. *Cro. Jac.* 255. And when it is said in the books that an attachment cannot be issued out of an inferior court, it is only meant that kind of attachment by which goods are forfeited and sold, or under which persons are taken, or the profits of land distrained.

3dly, The process is always general: but the officer must take a reasonable distress, otherwise he is liable to an action on the case on the stat. of *Marlbr.* 52 *Hen.* 3. *c.* 4, but not to an action of trespass.

4thly, *Taliter processum est* is sufficient in the case of officers of the court, and perhaps also in the case of the party (a); 1 *Lord Raym.* 80; 1 *Ventr.* 369; 2 *Lutw.* 1414; 2 *Lev.* 81; 3 *Lev.* 20; 3 *Keb.* 126; 2 *Mod.* 102, 195 (b); and in this case all the proceedings in the inferior court are set out in the plea.

5thly, It appears that the house was broken and entered at *Bradley* within the jurisdiction of the honor court, and that the goods were taken within the jurisdiction of the respective courts.

(a) *Say* 82.

(b) See also *Patrick v. Johnson*, 3 *Lev.* 403, 4; *Murray v. Wilson*, 1 *Will.* 316; *Adams v. Freeman*, 2 *Will.* 5, and *Say* 81;

and *Rowland v. Veale*, *Cowp.* 18. S. P. Though this mode of pleading was not allowed before the time of *Charles the Second*.

If it did not so appear, the objection arising from the want of a venue is cured by the stat. 4 & 5 An. c. 16. it not being specially pointed out as a cause of demurrer.

1744, 5.
JOHNSON
against
WARNER.

6thly, It appears that the precepts were issued out of the respective courts, that is, the one by the suitors who are the judges, and the other by the steward.

The Court overruled the objections (a), and gave Judgment for the defendants (b).

(a) The reasons given by the Court do not appear in the Lord Chief Justice's papers, but according to Mr. J. Abney's note the Court agreed with Mr. Serjt. Draper in his answers to all the objections. (b) See *Moravia v. Sloper*, M. 11 Geo. 2. sup. 30; and *Morse v. James*, M. 12 Geo. 2. sup. 122.

CHILDS *against* PROWSE.

H. 18 Geo. 2.
Monday,
Feb. 11th.
Bringing an
action on a
judgment,
within two
terms, is not
equivalent to
charging the
defendant in
execution
within two
terms, accor-
ding to the
rule E. 8 G. 1.

"A MOTION was made to discharge the defendant out of custody, because he was not charged in execution within two terms after judgment, according to the rule of E. 8 Geo. 1.

Gapper Serjt. for the motion.

Wynne Serjt. shewed cause against the rule; and admitted that no execution was sued out against the defendant in time, but insisted that an action was brought upon the judgment in the second term, which ought to be considered as a charge in execution within the meaning of the rule, or at least that it was a sufficient cause why the plaintiff had not proceeded to take out execution within the time prescribed by the rule.

But we were all clearly of another opinion, that it was no charge in execution. And we would not give so much countenance to this method of proceeding by action upon the judgment, when the defendant was liable to be charged or taken in execution (though by law this may be done) as to allow it to be a sufficient cause.

We therefore made the rule absolute (a)."

(a) See rule of Court, H. 8 G. 2. C. B.

1744. 5.

H. 18 Geo. 2.
Monday,
Feb. 11th.PARNHAM and Three Others *against* PACEY and
Seven Others.

The defend-
ants justified,
in trespass,
under a right
of common of
pasture: the
plaintiff re-
plied an in-
closure and
improvement
of the place
where &c by
the lord of the
manor, aver-
ring a suf-
ficiency of
common left
for the de-
fendant "and
all other per-
sons of right
having and
using com-
mon &c;"
the defendant
traversed the
sufficiency in
those words;
and after ver-
dict for the
plaintiff on
an issue on
that traverse
the Court re-
fused to grant
a repleader,
saying those
words meant
"all persons
having a right
to use the
common."

TO trespass for breaking and entering the plaintiffs' close, and eating the grafs with sheep &c, the defendants justified under a prescriptive right of common of pasture in the place where &c parcel of the waste or common called *Mapperley Plains* otherwise *Mapperley Hills* in the town of *Nottingham*, in the defendant *Pacey*, in right of a certain messuage with the appurtenances in *Nottingham*, of which he was seised in fee, for all his commonable cattle levant and couchant at all times of the year.

The plaintiffs replied that the waste or common called *Mapperley Plains* &c had been immemorially parcel of the manor of *Nottingham*; that the mayor and burgeses of *Nottingham* were seised of the said manor, and that before the time when &c they enclosed and approved the place in question, part of the said waste or common called *Mapperley Plains*, there being then left in the residue of the said waste not inclosed sufficient common of pasture for all the commonable cattle of the defendant (*Pacey*) levant and couchant upon his said messuage &c and "of all other persons of right *having and using* common of pasture in the said waste &c;" and that the mayor and burgeses afterwards and before the time when &c demised the said close &c to the defendants for 999 years, by virtue whereof they entered &c.

The defendants, in their rejoinder, traversed the sufficiency of the common not inclosed left for the commonable cattle of *Pacey* and "of all other persons of right having and using common of pasture in the said waste" &c.

Upon this traverse an issue was taken.

And after a verdict for the plaintiffs, the defendants obtained a rule to shew cause why a repleader should not be awarded which

which after argument] was discharged (a), and the plaintiffs had judgment.

1744, 5.

PARNHAM
against
PACEY.

(a) The following account of this case is taken from Mr. J. Abney's MS. "Bootle Serjt. obtained a rule to shew cause why the entry of final judgment should not be stayed, and why a repleader should not be awarded; and he and Skinner King's Serjt. insisted that "having and using" was an immaterial issue and too narrow; for every one having a right might not possibly use it. And therefore the issue ought to have been *only on the right of common*, and not on the usage. This is not only an improper issue, but quite immaterial, like debt upon bond and payment before the day. *Cro. Jac.* 434; *Com. Rep.* 148; *Salk.* 223; and 2 *Lev.* 11. And an immaterial issue is not aided. 1 *Lev.* 32.

For the plaintiffs Willes, Belfield, and Draper Serjts. argued that by law and within the stat. of *Merton* 2 *Inst.* 87. Lords may approve the waste and com-

mons that the tenants do not use, leaving sufficient common of pasture at the time of the approvement. "Using and having" imply no more than a prescriptive right; usage is the evidence of the right. *Godb.* 55; 1 *Sid.* 237. The issue is not immaterial, and if it be only improper, a repleader ought not to be awarded. 1 *Lord Raym.* 167 (1). The true rule is that where the Court can give judgment on the whole verdict and pleadings no repleader ought to be awarded. 1 *Lev.* 32.

By *The Court*, Here is sufficient for the Court to give judgment upon. In the plea and issue it is "of right having and using common," that is "all persons having a right to use the common."

And per the Chief Justice and *Burnett J.* the plaintiffs had judgment. *Abney J.* being a burgess of *Nottingham* gave no opinion."

(1) *Cary v. Hinton*, 2 *Sir.* 973. S. C.

The KING against The Archbishop of YORK and HAYES.

H. 18 Geo. 2
Tuesday,
Feb. 12th.

"QUARE impedit. The defendant moved to plead two pleas on the stat. 4 & 5 *An. c.* 16 (b).

When the King is plaintiff in a quare impedit the defendant cannot plead double under the stat. 4 and 5 *An. c.* 16.

The objection made against it by *Agar Serjt.* was that the King was not bound by this statute, because not expressly named. That the words of the clause being "plaintiff and defendant" could never be intended to include the King; and that it is plain by the next (c) clause that the King was not intended to be included, because there are directions concerning

(b) By sect. 4. it is enacted that "any defendant or tenant in any action or suit, or any plaintiff in replevin in any court of record," may, with the leave of the same court, plead as many several matters as he shall think necessary for his defence.

(c) The fifth section provides that if any such matter shall, upon a demurrer joined, be deemed insufficient, costs shall be given

at the discretion of the Court; or if a verdict shall be found upon any issue in the said cause for the plaintiff or demandant, costs shall be also given in the like manner, unless the Judge who tried the issue shall certify that the said defendant or tenant or plaintiff in replevin had a probable cause to plead such matter &c.

1744, 5.

The KING
against
The Arch-
bishop of
YORK.

the payment of costs in case there is a demurrer to the pleas or a verdict for the plaintiff and the Judge does not certify that there was good cause for pleading such double matter. And he said that it had been holden that the statutes of jeofails do not extend to the King. That the Court of King's Bench had denied a defendant to plead two pleas in an information in the nature of a quo warranto (a), though by the opinion of six Judges against six that is to be considered as a civil action (b). That the same had likewise been denied after two solemn arguments in the Exchequer on an information of intrusion (c), which is certainly a civil action, where it was holden (P. 16 Geo. 2.) that the King was not within the words (d) or intent of the statute.

Bootle Serjt. for the defendant insisted that, this being a civil action, the King was within the intent of the statute; it being a remedial law, and therefore included though not expressly named. He relied much upon the exceptions in the proviso (e) of some criminal prosecutions, and said that *exceptio probat regulam de non exceptis*. He admitted that it had been denied in informations in nature of a quo warranto, but insisted that they are to be considered as criminal prosecutions, and so there is a great difference between those and the present case. And he endeavoured to make a distinction between an information for an intrusion and the present case. He relied likewise on the stat. 9 An. c. 20., which extends the stat. 4 & 5 An. to writs of mandamus and informations on that statute.

I THOUGHT it a difficult point, and desired time to consider of it, and so did my Brothers *Abney* and *Burnett*; but they seemed inclined to think that two pleas could not be pleaded in the present case. And

(a) Vid. *R. v. Foley*, cited in *Park. Rep.* 10. But now by stat. 32 Geo. 3. c. 58. s. 1., which allows a defendant to plead, to an information in nature of a quo warranto, that he has exercised his office or franchise for six years before the exhibiting of the information, he may plead several matters, with the leave of the Court.

(b) *R. v. Bennet*, 4 Geo. 1. 1 Str. 101; and cited in *Park.* 10, 11. This point was again doubted in *R. v. Jones*, M. 10 Geo. 1. 8 Mod. 201. But in a subsequent case, *R. v. Francis*, 2 D. & E. 484,

the Court of King's Bench granted a new trial; saying that of late years a quo warranto information had been considered merely in the nature of a civil proceeding, and that there were several instances since the case in *Strange* in which a new trial had been granted.

(c) *The Attorney General v. Allgood*, *Park. Rep.* 1.

(d) Except in certain cases enumerated in sect. 24.

(e) Sect. 7.

My Brother *Abney* cited 2 *Inst.* 424, and *Savile* 2., where it was holden that the statute of *Westm.* 2. c. 30. concerning *nisi prius* does not extend to the King (a); and that although the act is general, yet a *nisi prius* cannot be granted where the King is party, or where the matter toucheth the right of the King, without a special warrant from the King or the consent of the Attorney General. He said likewise that c. 31. of the same act, concerning bills of exceptions, was never thought to extend to the crown (b). And he mentioned some cases (c) where such pleas had been denied; and said that he thought that the stat. 9 *An. c.* 20., extending this statute to writs of *mandamus* &c rather strengthened the objection.

1741, 5.

The KING
against
The Arch-
bishop of
YORK.

Burnett J. also cited a case, where it had been holden that the words "plaintiff and defendant" could not mean the King."

—The rule, for leave to plead double, was in the *Easter* term following, discharged *Vid. Barnes*, 353.

(a) *R. v. Dyde* and another, 7 *Dunf. & East* 661. S. P.

(b) The stat. *Westm.* 2. (13 *Ed.* 1. ft. 1.) c. 31., which gives the bill of exceptions, uses these words "When one that is impleaded before any of the Justices doth allege an exception" &c. Lord *Coke*, in his comment on this statute, 2 *Inst.* 427, says "This act doth extend as well to the demandant or plaintiff as to the tenant or defendant in all actions real personal and mixed." And in *R. v. Higgins* and others, on a trial at bar of a quo warranto information, a bill of exceptions was tendered by the defendant's counsel, and allowed by the Court, though it does not appear that the case was afterwards argued in the Court of Error. 1 *Ventr.* 366; Sir *T. Raym.* 484; and *Skin.* 91.—So in the case of informations in the exchequer, Lord *Hardwicke* (*Rep. temp. Hardw.* 251) said that when he was Attorney General he had known a bill of exceptions allowed, "but then (said his

Lordship) they are properly civil suits for the King's debts: so in *devenerunt*; but they are called the King's actions of trover, and before the late act of parliament the King recovered nothing but the value."—But a bill of exceptions cannot be allowed by the Justices of the peace at the quarter sessions on the hearing of an appeal against an order of removal. *The King v. The Inhabitants of Preston*, *Rep. temp. Hardw.* 249.

(c) "Attorney General v. Bulkley (1), in the exchequer. *M. 10 W.* 3. The defendant died after the verdict and before the day in bank; and *per Curiam*, the crown is not within the stat. 17 *Car.* 2. c. 8. to enter up judgment.—*Hil. 5 Geo.* 2. *B. R. Rex v. Franklyn*; The Court denied a *venire facias de novo*, because the King is not comprised within the words "plaintiff or defendant, demandant or tenant" in 7 and 8 *W.* 3. c. 32 (2).—*The Attorney General v. Allgood* (3)." MS. *Abney J.*

(1) *Park. Rep.* 264.(2) See *R. v. Perry*, 5 *Dunf. & East* 453.(3) Reported in *Park. Rep.* 1.

1744, 5.

H. 18 Geo. 2.
Tuesday,
Feb. 12th.JOHN ANDREWS *against* THOMAS CAWTHORNE.

[East. 13 Geo. 2. Rol. 1017.]

No burial fee
is due at com-
mon law: but
it may be due
by custom in
any particular
parish.

—The burial
fees in St.
George's
Bloombsbury
are directed
by stat. 3 G. 2
c. 19. to be
fixed by cer-
tain com-
missioners.

THIS was an action of assumpsit to recover 5*l.* for money had and received by the defendant to the use of the plaintiff.

The defendant, having pleaded the general issue, a special verdict was found; stating, that as to 4*l.* 16*s.* 8*d.* the defendant did not undertake &c; and as to the sum of 3*s.* 4*d.* residue of the sum of 5*l.* they find that the defendant received it by the order of *Edward Vernon* rector of the parish and parish church of *St. George's Bloombsbury* in the county of *Middlesex*, as a burial fee claimed by Dr. *Vernon* for the burial of *A. Micklebrough* in the new cemetery or churchyard assigned and belonging to the parish of *St. George's Bloombsbury*. That the said cemetery before the time that *A. Micklebrough* was buried there had by virtue of certain acts of parliament 9 *An. c.* 22; 10 *An. c.* 11; 1 *Geo. 1. st. 1. c.* 23; 4 *Geo. 1. c.* 14; and 3 *Geo. 2. c.* 19. been purchased and assigned as a cemetery for the parish of *St. George's Bloombsbury*, and had been duly consecrated, as by the said acts is directed. That *A. Micklebrough* was a parishioner of the parish of *St. George's Bloombsbury* at the time of her death, and the plaintiff *Andrews* her executor; and that at the time of taking the fee of 3*s.* 4*d.* Dr. *Vernon* was and still is rector of the said parish. That the whole of the parish of *St. George's Bloombsbury* (except the said cemetery) was formerly part of the parish of *St. Giles* in the fields, and was duly divided and separated therefrom by the commissioners, in pursuance of the directions of the said several acts of parliament, and the instrument for the appointment of the said parish of *St. George's Bloombsbury* was duly inrolled in chancery as the said acts direct; and that before the burial of the said *A. Micklebrough* the parish church of *St. George's Bloombsbury* was duly consecrated. That there is an immemorial custom within the parish of *St. Giles*, for the rector of the parish of *St. Giles* to receive a fee of 3*s.* 4*d.* for the burial of every parishioner buried in the cemetery of the said parish or in any other of the

the burial places of the said parish, and a larger fee for every parishioner buried within the church of the said parish. That the new cemetery in which *A. Micklebrough* was buried never was any part of the ancient burying places belonging to the parish of *Saint Giles*, nor ever was part of the parish of *Saint Giles*, but was part of the parish of *Saint Pancrass*, and lies in the fields upwards of a mile distant from the church and rectory-house of *Saint George's Bloomsbury*. And then the jury made the general conclusion, and prayed the advice of the Court &c.

1744. 5.

ANDREWS
against
CAW-
THORNE.

After two arguments, the one in the *Michaelmas* term preceding, the other in this term, by *Skinner* and *Prime King's* Serjeants for the plaintiff, and *Willes King's* Serjeant and *Wynne* Serjeant for the defendant, and also by *Dr. Vernon* himself, the opinion of the Court was given for the plaintiff by *Abney J. (a)*, the Lord Chief Justice declining to give any opinion on account of his being a parishioner of *Saint George's Bloomsbury*.

Judgment for the plaintiff.

(a) The following opinion of the Court was given by Mr. Justice *Abney*, who first stated the pleadings and the special verdict.

"The general question is whether *Dr. Vernon*, rector of *Saint George's Bloomsbury*, is well entitled to the burial fee of 3 s. 4 d. for the burial of *Ann Micklebrough* his parishioner in the new cemetery; and this question, as my Brother *Burnet* and I conceive, will depend entirely, not on any construction but, on the plain words of the statute 10 An. c. 11. and 3 G. 2. c. 19. which I will read at large by and bye.

But as I conceive it not altogether foreign or improper to follow the learned Serjeants in their arguments, I shall

In the first place give a short abstract or historical account of burial by the ancient law civil and canon;

2dly, A succinct history of burials and burial fees by our common law; and

3dly, Consider the particular case of *Dr. Vernon*, the rector of *Saint George's Bloomsbury*.

Now it is most notorious and certain that all burials by the Roman laws were

prohibited not only within the temples but even in cities and large towns, and by the very words of the law of the twelve tables *hominem mortuum intra urbem ne sepulite*. And this prohibition was founded on a prudent state policy, to prevent infection, from a great number of corrupt corpse lying contiguous in putrefaction; and it is well known that the poorer sorts in great parts of the kingdom are buried in shrouds without coffins even to this day.

But when popery grew to it's height, and blind superstition had weakened and enervated the laity, and emboldened the clergy to pillage the laity, then in the time of Pope *Gregory 1st*. (vid. 1 *Gibson Cod.* 544.) and soon after other canons were made, that bishops abbots priests and faithful laymen were permitted the honour of burial in the church itself, and all other parishioners in the church-yard, on a pretence that their relations and friends on the frequent view of their sepulchres would be moved to pray for the good of the departed souls.

And as the parish priest by the canon was the sole judge of the merits of the dead

1744, 5.

H. 18 G. 2.
Feb. 23d.
In Chancery.OMICHUND *against* BARKER.

SEVERAL persons resident in the *East Indies* and professing the *Gentoo* religion, having been examined on oath administered

The depositions of witnesses professing the *Gentoo* religion, who were sworn according to the ceremonies of their religion taken under a commission out of chancery, admitted to be read as evidence.

dead and the fitness of burial in the church, and he would only determine who was a faithful layman, they only were judged faithful, whose executor came up to the price of the priest, and they only were allowed burial in the church, and the poorer sort were buried in the church-yard. But in neither case was any fee claimed or pretended to be due for the celebration of the office. But in the first case as the church was the rector's freehold, the payment was made in consideration of breaking the ground and floor, and the sum was contracted for; and in the latter case some small voluntary oblation was frequently made, and which by length of time has grown up in many parishes into a customary payment; and yet *Lyndwood Lib. 5. tit. 2. fo. 278.* condemns it as *Simony*.

This affair of burial soon growing very profitable, a new canon was made, (*Vid. 1 Gibson 543.*) That no person was to be buried out of his parish without the consent of or till the oblation was paid to the parochial minister. But it is worth while to observe that none of these canons are in force here at this day; and I think the only canon now admitted and received by our laws relating to this question is the canon 68 of the canons 1603; which is in these words; "No minister shall refuse or delay to bury any corpse that is brought to the church or church-yard on convenient warning given him thereof;" and this seems a kind of transcript of the old laws. *Jus sepulturæ vel sacramenta ecclesiæ nullò denegentur ob defectum pecuniæ; Lyndwood page 278.*

And the burial of the dead is (as I apprehend) the clear duty of every parochial priest and minister; and if he

neglect or refuse to perform the office, he may by the express words of the canon 86 be suspended by the ordinary for three months: And if any temporal inconvenience arise as a nuisance from the neglect of interment of the dead corpse, he is punishable also by the temporal courts, by indictment or information, *H. 7 G. 1. B. R.* That court made a rule on Mr. *Taylor*, rector of *Daventry* in *Northamptonshire*, to shew cause why an information should not be filed, because he neglected to bury a poor parishioner who died in that parish.

It is worth observation that no ancient or modern constitution or canon fixed or pretended to fix any fee either for sepulture or the burial office; and *Lyndwood* (*ubi supra*) calls it *simony*. The truth is, the canons could not fix any fee; for Lord *Holt*, in *Salk. 332.*, truly says that the canons cannot take any money out of laymen's pockets. Thus much is sufficient for the first head, how sepulture stood at the canon law.

Now, Secondly, to consider how it stands by the common law. My Brother *Wynne* attempted to prove that the burial fee was the same as the corpse present, or mortuary; and cited 21 *H. 8. c. 6.* to shew that 3 s. 4 d. was the least sum by the statute paid for a mortuary. If he had been pleased to cite the preamble, he would see how the poor labourers and others were squeezed by the clergy. And Dr. *Gibson* does by no means like that statute (*vid. 2 Gibson, 745.*) But there is no colour to imagine that a present made on the burial of the dead, which was a gift by way of recompence for subtracting personal tythes and offerings, a kind of commutation, is like to a burial fee; *vid. 2 Inst. 491.* And even in mortuaries it is to be noted that they were not due by common right,

ministered according to the ceremonies of their religion under a commission sent there from the Court of Chancery, it became a question

1744, 5.

OMICHUND
against
BARKER.

right, but by custom only. The word "corse" is the same as "corpse." So that corse present is a gift with the dead body. However this may be, this is most clear and certain, that by the common law of England, no fee is or ever was due for baptism or burial, which is de jure or of common right; and where any fee is due, it must be by the custom of the particular parish or place, which customs like all other customs (if controverted) is triable and determinable only in the King's temporal courts by the King's temporal Judges. To this purpose I cite *Burdeaux v. Dr. Lancaster et al.* Hil. 9 W. 3. Salk. 332, but more fully reported, Cases W. 3. fo. 171 (1). *Burdeaux* a French Protestant had his child baptized at the French church in the Savoy, and Dr. Lancaster vicar of Saint Martin's in the fields, in which parish the Savoy was, together with the parish clerk libelled, against him for the fee of 2s. 6d. for the vicar and 1s. for the clerk; and per Holt no fee is due of common right for baptism or burial, and where due it must arise from custom, and the duty must be performed; and he allowed the case in *Hob.* 175 to be law; and upon solemn argument a prohibition was granted. 2 Lutw. 1030. *Anderson v. Walker* Sacramenta debent esse libera; in the case of a baptism fee. And in *Salk.* 234. The dean and Chapter of Exeter's case, it was adjudged that no fee is due for burial, unless by custom.

But those few cases are sufficient on this head; since the defendant's counsel candidly owned this point, that no burial fee was due of common right, and not due without the help of a custom; and this brings me to

The third and last point which we think to be a very clear and a short one, whether Dr. Vernon is entitled to the fee of 3 s. 4 d.

for the burial of *Ann Micklebrough* in the new cemetery of *Saint George's Bloomsbury*.

Had the right of Dr. Vernon depended on the canon law only, it would not have assisted him. Had it depended on custom, it would have helped him in the parish of *Saint Giles*, if he were rector there. But this right depends neither on the common law or custom, but on the plain clear and express words of two acts of parliament, which have destroyed the customary payment of 3 s. 4 d. in such part of *Saint Giles's* parish as is now part of *Saint George's Bloomsbury*, and introduced a parliamentary payment and a new method of ascertaining adjusting affixing and settling the burial fees.

The words of 10 An. c. 11. s. 21. are these; "It is enacted and declared that all parochial customs usages bye-laws and privileges as are now in force or use within any present parish which shall be divided by virtue of this act shall, notwithstanding such division, continue and be in force as well in and for every new parish, as in and for such parish as shall remain to the present parochial church &c." If this clause had stood without any variation, we are of opinion, that Dr. Vernon would be entitled to receive the sum of 3 s. 4 d., which the verdict finds to be the customary fee due to the rector of *Saint Giles* on the burial of every parishioner. And we are of opinion that this clause hath clearly transferred and carried over to the new parish of *Saint George's Bloomsbury* all legal and reasonable customs in *Saint Giles's*, and even though the new cemetery of *Saint George's Bloomsbury* was never any part of *Saint Giles's*. But sect. 31. has varied the twenty-first section, and enacts, "That it shall and may be lawful for the commissioners or any five of them to ascertain the sum of money that shall be paid

1744, 5.
OMICHUND
against
BARKER.

a question whether those depositions could be read in evidence here; and the Lord *Chancellor*, conceiving it to be a question of considerable importance, desired the assistance of *Lee* Lord Chief Justice B. R., *Willes* Lord Chief Justice C. B., and the Lord Chief Baron *Parker*, who after hearing the case argued were unanimously of opinion that the depositions ought to be read.

The case is shortly reported in 1 *Wils.* 84, and more fully in 1 *Atk.* 21. The following opinion was delivered by

Willes Lord Chief Justice C. B. "I could satisfy myself by merely saying that as to the present question I am of the same opinion as the Lord Chief Baron: but as this is in a great measure a new case, as it is a question of great importance, and as so much has been said by the counsel on both sides, I believe it will be expected that I should give my reasons for the opinion which I am going to give, though in the course of my argument I must necessarily touch upon many things that have been already better expressed by the Lord Chief Baron.

to the rector and each officer belonging to each church for every burial in any of the cemeteries or church-yards by this act intended to be purchased."

And the statute 3 G. 2. c. 19. sect. 5., after taking notice of former statutes, superadds several conditions precedent to the rector's right of a burial fee. "Whereas by the said recited acts the commissioners or any five of them are empowered to ascertain the sums of money that shall be paid to each officer belonging to each new church, be it enacted that the commissioners with the consent of the vestry shall have full power to fix and ascertain what sums shall be paid to the rector and each officer of the new church of *Saint George's Bloomsbury* for or in respect of any burial, which sums when so ascertained shall be registered in *Doctors' Commons*, and when so registered shall be deemed and are hereby declared to be the sums that shall be paid to the said rec-

tor and parish-officers for every such burial."

So that until the commissioners and vestry have fixed the sum to be taken and the same registered neither the doctor as rector, or any of the parochial officers, can take 3 s. 4 d. or any fee for the burial in the new cemetery in *Saint George's Bloomsbury*.

The commissioners and vestry have an arbitrary power to settle the sum, which may be more or less than 3 s. 4 d. in the old parish. When it is settled and registered, the rector will be legally entitled to the sum so ascertained. But it is not ascertained and registered; therefore

Judgment must be for the plaintiff."

— "N. B. A writ of error was brought on this judgment in B. R.; and in *Michaelmas* term 22 G. 2. the judgment of C. B. was affirmed." MS. *Abney J.*

Though it be necessary only to give my opinion whether the depositions taken in the present case can be read or not, yet it may be proper in order to come at this particular question, in the first place to consider the general question, whether an infidel, I mean one who is not a christian, for in that case Lord *Coke* certainly meant it, can be admitted as a witness in any case whatsoever. If I thought with my Lord *Coke* that he could not, I must necessarily be of opinion that the depositions in the present case could not be read as evidence. On the other hand, if I thought that infidels in all cases and under all circumstances ought to be admitted as witnesses, the consequence would be as strong the other way, that these depositions ought to be read. But if I should be of opinion (and I shall certainly go no further) that some infidels in some cases and under some circumstances may be admitted as witnesses, it will then remain to be considered, whether these infidels, who are examined in the cause under the circumstances in which they appear in this court, are legal witnesses or not.

1744, 5.

OMICHUND
against
BARKER.

As to the general question, Lord *Coke* has resolved it in the negative, *Co. Lit.* 6. b. That an infidel cannot be a witness; and it is plain by this word "infidel" he meant *Jews* as well as *Heathens*, that is, all who did not believe the christian religion. In 2 *Inst.* 507. and many other places, he calls the *Jews Infidel Jews*; and in the 4 *Inst.* 155, and in several other passages of his books, he makes use of this expression *Infidel Pagans*, which plainly shews that he comprised both *Jews* and *Heathens* under the word *Infidels*; and therefore Serjt. *Hawkins* (though a very learned pains-taking man) is plainly mistaken in his *History of the Pleas of the Crown*, 2 vol. p. 434., where he understands Lord *Coke* as not excluding the *Jews* from being witnesses, but only *Heathens*. But Lord Chief Justice *Hale* understood this in another sense in that remarkable passage of his, which I shall mention more particularly by and bye. I shall therefore take it for granted that Lord *Coke* made use of the word *Infidels* here in the general sense; and that will, I think, greatly lessen the authority of what he says; because long before his time, and of late almost ever since the *Jews* have returned into *England*, they have been admitted to be sworn as witnesses. But I think the counsel for the defendant seemed to

1744, 5.
 OMICHUND
 against
 BARKER.

mistake the reason upon which Lord *Coke* went. For he certainly did not go upon this reason, that an infidel could not take a christian oath, and that the form of the oath cannot be altered but by act of parliament: but upon this reason, though I think a much worse, that an infidel was not *fide dignus* nor worthy of credit; for he puts them in company and upon the level with stigmatized and infamous persons. And that this was his meaning appears more plainly by what he says in *Calvin's* case, 7 *Co.* 17. *b.*, that all infidels are in law perpetual enemies; for between them as with the devils, whose subjects they are, and the christians there is perpetual hostility, and can be no peace. For as the apostle saith 2 *Cor.* 6. v. 15; *quæ conventio Christi cum Bialia? Quæ pars fideli cum infideli? Infideles sunt Christi et christianorum inimici.* And herewith agreeth the book in 12 *H.* 8. *fol.* 4, where it is holden that a *Pagan* cannot maintain any action at all. But this notion, though advanced by so great a man, is I think contrary not only to the the scripture but to common sense and common humanity. And I think that even the devils themselves, whose subjects he says the *Heathens* are, cannot have worse principles; and besides the irreligion of it, it is a most impolitic notion and would at once destroy all that trade and commerce from which this nation reaps such great benefits. We ought to be thankful to providence for giving us the light of christianity, which he has denied to such great numbers of his creatures of the same species as ourselves. We are commanded by our Saviour to do good unto all men, and not only unto those who are of the household of faith. And *Saint Peter* saith *Acts* 10. v. 34. 35. That "God is no respecter of persons, but in every nation he that feareth him and worketh righteousness is accepted with him." It is a little mean narrow notion to suppose that no one but a christian can be an honest man. God has implanted by nature on the minds of all men true notions of virtue and vice, of justice and injustice, though *Heathens* perhaps more frequently act contrary to those notions than christians, because they have not such strong motives to enforce them. But (as *Saint Peter* says) there are in every nation men that fear God and work righteousness; such men are certainly *fide digni* and very proper to be admitted as witnesses. I will not repeat what was said by Sir *George Treby* in the case of mono-

polies

polies in the *State Trials*, vol. 7. p. 502, of this notion of Lord Coke's, and which was cited by one of the counsel, but I think that it very well deserves every epithet that he has bestowed on it. I have dwelt the longer upon this saying of his, because I think it is the only authority that can be met with to support this general assertion, that an infidel cannot be a witness. For though it may be founded upon some general sayings in *Bracton*, *Fleta*, and *Briton*, and other old books, those I think of very little weight, and therefore shall not repeat them; first, because they are only general dicta; and in the next place, because these great authors lived in very bigotted Popish times, when we carried on very little trade except the trade of religion, and consequently our notions were very narrow, and such as I hope will never prevail again in this country. As to what is said by that great man the Lord Chief Justice Fortescue in his book *De Laudibus*, b. 26, that witnesses are to be sworn on the holy evangelists; he is speaking only of the oath of a *christian*, and plainly had not the present question at all in his contemplation. To this assertion of my Lord Coke's (besides what I have already said) I will oppose the practice of this kingdom before the *Jews* were expelled out of it by the stat. 18 E. 1. For it is plain both from *Madox's History of the Exchequer*, p. 167 and 174, and from *Seld.* vol. 2. p. 1469, that the *Jews* here in the time of King *John* and *Henry* the Third were both admitted to be witnesses and likewise to be upon juries in causes between *Christians* and *Jews*, and that they were sworn upon their own books or their own roll which is the same thing. I will likewise oppose the constant practice here almost ever since the *Jews* have been permitted to come back again into *England*; viz. from the 19 Car. 2., (when the cause was tried which is reported 2 *Keble* 314,) down to the present times, during which I believe not one instance can be cited in which a *Jew* was refused to be a witness and to be sworn on the Pentateuch. To this assertion I shall likewise oppose the very great authority of Lord *Hale*, 2 vol. 279. And though this has often been mentioned by the counsel, it is so full of law, of good sense, and the spirit of christianity, that I think it cannot be repeated too often; decies repetita placebit. "It is said by Lord *Coke* that an infidel is not to be admitted as a witness;

1744, 5.

OMICHUND
against
BARKER.

1744, 5.
OMICHUND
against
BARKER.

witness; the consequence of which would be that a *Jew*, who only owns the *Old Testament*, could not be a witness. But I take it that although the regular oath, as it is allowed of by the Laws of *England* is tactis sacrosanctis Dei Evangeliiis, which supposeth a man to be a christian, yet in cases of necessity, as in foreign contracts between merchant and merchant which are many times transacted by *Jewish* brokers, the testimony of a *Jew* tacto libro legis Mosaicæ is not to be rejected, and is used (as I have been informed) amongst all nations. Yea the oaths of idolatrous infidels have been admitted by the municipal laws of many kingdoms, especially si juraverint per verum Deum creatorem; and special laws are instituted in *Spain* touching the forms of the oaths of infidels; vid. *Covarruviam*, tom. 1. p. 1. de juramenti formâ." And he mentions a case where it would be very hard if such an oath should not be taken by a *Turk* or *Jew*, which he holds binding; "for possibly he might think himself under no obligation if he were sworn according to the usual form of the Courts of *England*: but then it must be agreed that the credit of such testimony must be left to the jury." Upon this citation of Lord *Hale* out of *Covarruviam* I shall say once for all, that I do not lay any great stress on the citations out of the Civil Law Books, not only because I think the present case does not want them, but likewise because they only shew that there are particular laws and edicts in other countries which determine this question there, and therefore they are not so applicable to the present case, since it is not pretended that there is any act of parliament, which has settled this matter. This use indeed, and this only, can be made of these citations to shew that the opinion of the legislature in other countries has been for admitting this sort of evidence.

The last answer that I shall give to this assertion of Lord *Coke*'s, as explained in *Calvin*'s case are his own words in his 4th *Inst.* p. 155. "Fœdus pacis or commercii, (saith he,) though not mutui auxilii, may be stricken between a Christian Prince and an Infidel Pagan; and as these leagues are to be established by oath, a question will arise whether the Infidel or Pagan Prince may swear in this case by false gods, since he thereby offendeth

offendeth the true God by giving worship to false gods. This doubt (saith he) was moved by *Publicola* to *Saint Augustine*, who thus resolveth the same; "He that taketh the credit of him who sweareth by false gods not to any evil but good, he doth not join himself to that sin of swearing by devils but is partaker with those lawful leagues, wherein the other keepeth his faith and oath; but if a christian should anyways induce another to swear by them, he would grievously sin. But seeing that such leagues are warranted by the word of God, all incidents thereto are permitted." This is (I think) as inconsistent as possible with his notion that an infidel is not fide dignus, and a full answer to what he said in *Calvin's* case on this head; and therefore I shall leave him here, having (I think) quite destroyed the authority of his general rule, that none but a christian ought to be admitted as a witness.

1744, 5.
OMICHUND
against
BARKER.

I shall now proceed to explain the nature of an oath, which will I think contribute very much towards the determination of the general as well as the present question. If an oath were merely a christian institution, as baptism, the sacrament, and the like, I should be forced to admit that none but a christian could take an oath. But oaths were instituted long before christianity was made use of to the same purposes as now, were always held in the highest veneration, and are almost as old as the creation. Juramentum (according to Lord *Coke* himself) nihil aliud est quam deum in testem vocare; and therefore nothing but the belief of a God and that he will reward and punish us according to our deserts is necessary to qualify a man to take an oath. We read of them therefore in the most early times. If we look into the sacred history, we have an account in *Genesis*, c. 26. v. 28. and 31; and again *Genesis*, c. 31. v. 53, that the contracts betwixt *Isaac* and *Abimelech*, and between *Jacob* and *Laban*, were confirmed by mutual oaths; and yet the contracting parties were of very different religions, and swore in a different form. It would be endless to cite the places in the *Old Testament* where mention is made of taking an oath upon solemn occasions, and how great a reverence was always paid to it. I shall only take notice of three, one in *Numb.* 30. 2. "He that sweareth an oath bindeth

6Z

his

1744, 5.
OMICHUND
against
BARKER.

his soul with a bond." Another in *Deut. c. 6. v. 13.* "Thou shalt fear the Lord thy God, and swear by his name." And another, *Psalms 15. v. 5.* Where a righteous man is described in this manner, "One who sweareth unto his neighbour and disappointeth him not, though it were to his own hindrance."

From the passages of the *New Testament*, where mention is made of an oath, it is plain that it continued to be used in the same manner, and to be had in the same, if not greater, veneration after the coming of our Saviour. The nature of an oath was not at all altered, only as the promise of rewards and punishments in another world was then more clearly revealed, the obligation of an oath grew much stronger, and those who were really christians were under a greater apprehension of breaking it. "An oath for confirmation (saith *Saint Paul*) is an end of all strife," *Heb. c. 16.* And I cannot forbear mentioning one passage more out of the *New Testament* to shew what great reverence was paid to an oath even by the most wicked men; and under what great apprehensions they were of breaking it. It is in *Matt. c. 14. v. 6 to 9.*, and it is related in the same manner by *Saint Mark, c. 6. v. 23 to 26*, that *Herod* having sworn to *Herodias* that whatsoever she asked of him he would give it her, though he was exceeding sorry when she asked of him the head of *Saint John the Baptist*, yet for his oath's sake and the sake of them who sat with him he would not reject her. And I cannot help likewise in this place (though a little out of course) taking notice of what is said by *Lactantius* on this subject, that some in his time, who were so very wicked as not to be afraid even of committing murder, had yet such a veneration for an oath and such a dread of being foresworn that when purged upon their oaths they durst not deny the fact.

If we look into profane authors, we shall find pretty much the same account of an oath. I shall mention only two or three of the most ancient and best of them. It appears in several places in *Homer*, that not only his heroes but likewise his gods, whom he represents as gods of the second rank subject to one supreme being, frequently confirmed their promise or threats with an oath, and that they were then looked upon as unalterable. In two places in *Hesiod*, the one in his book *de generatione*

generatione deorum, and the other in another book, it is said that horrible misfortunes and punishments will befall those who swear falsely. So in the beginning of *Pythagoras's Golden Verses*, considering an oath as very sacred and as a sort of religious worship. And *Hierocles*, who is very large in his comment on this passage, says an oath was looked upon by the ancient fathers as one of the most solemn acts of religion. I shall conclude with *Cicero*, who never speaks of an oath but with the greatest reverence, and as the strongest tie which can be laid upon men, *Nullum vinculum* (says he) *ad astringendam fidem majores nostri arctius jurejurando crediderunt*. To these great authorities I shall only beg leave to add the sentiments of two modern writers, but writers of very great credit, I mean *Grotius de jure belli et pacis*; lib. 2. c. 13. §. 1. His words are, *Apud omnes populos et ab omni ævo circa pollicitationes promissa et contractus maxima semper vis fuit jurisjurandi*. And *Tillotson's Sermons*, vol. 1. p. 241. where he says that "It is the general practice of mankind, which has universally obtained in all ages and nations to confirm things by an oath in order to the ending of differences."

1744. 5.
OMICHUND
against
BARKER.

It is very plain from what I have said that the substance of an oath has nothing to do with Christianity, only that by the Christian religion we are put still under great obligations not to be guilty of perjury: the forms indeed of an oath have been since varied, and have been always different in all countries according to the different laws religion and constitution of those countries. But still the substance is the same, which is that God in all of them is called upon as a witness to the truth of what we say. *Grotius* in the same chapter sect. 10. says, *forma jurisjurandi verbis differt, re convenit*. There are several very different forms of oaths mentioned in *Selden*, vol. 2. p. 1470.: but whatever the forms are he says that is meant only to call God to witness to the truth of what is sworn; "sit Deus testis," "sit Deus vindex," or "ita te Deus adjuvet," are expressions promiscuously made use of in Christian countries; and in ours that oath hath been frequently varied; as "ita te Deus adjuvet tactis sacrosanctis Dei Evangeliiis;" "ita &c et sacrosancta Dei Evangelia;" "ita &c et omnes sancti." And now we keep only these words in the oath, "so help you God," and which

1744, 5.
 OMICHUND
 against
 BARKER.

indeed are the only material words, and which any heathen who believes a God may take as well as a Christian. The kissing the book here, and the touching the bramin's hand and foot at *Calcutta*, and many other different forms which are made use of in different countries, are no part of the oath, but are only ceremonies invented to add the greater solemnity to the taking of it, and to express the assent of the party to the oath when he does not repeat the oath itself: but the swearing in all of them, be the external form what it will, is calling God Almighty to be a witness, as is clear from these words of our Saviour in *Matthew*, chap. 23. v. 21. and 22. "Who so sweareth by the Temple sweareth by it and him that dwelleth therein; and he that sweareth by Heaven sweareth by the Throne of God and by him that sitteth thereon." As to what was said by the counsel that Christianity is part of the law of *England*, (which is certainly true as it is here established by laws) and that therefore to admit the oath of a heathen is contrary to the law of *England*; it appears from what I have already laid down that there is nothing in that argument, since an oath is no more a part of Christianity than of every other religion in the world. There is likewise as little in another argument which was made use of, that an oath cannot be altered but by act of parliament; for the form of an assertory oath here hath been frequently varied (as I have already observed). And what Lord *Coke* says in the 2 *Inst.* 479. and 3 *Inst.* 165, that an oath cannot be altered, nor a new one imposed, but by authority of parliament plainly relates only to promisory oath or oaths of office as those of Privy Counsellors, Judges, Sheriffs, and the like, and not at all to oaths taken by witnesses. As to the passage mentioned out of the *State Trials* where the Lord Chief Justice asked if the witness were a Christian or not, who appeared to be otherwise by his mien and dress and was going to take the common oath, and as to what was said that Lord Chief Justice *Eyre* once refused to swear a man on the Evangelists who was not a Christian, and that Lord Chief Baron *Gilbert* did the same to one who when asked whether he believed in Christ declared that he did not know who Christ was; very little can be inferred from either of these instances, since it does not appear that the fact, to which the witness was going to be sworn, arose in a foreign country, or that it was a mercantile cause, or that it was ever insisted

insisted on by the counsel that the witness should be examined in any other manner than in the common form upon the Holy Evangelists.

1744, 5.
OMICHUND
against
BARKER.

Having now I think sufficiently shewn that Lord *Coke's* rule is without foundation either in scripture, reason, or law, that I may not be understood in too general a sense, I shall repeat it over again, that I only give my opinion that such infidels who believe a God and that he will punish them if they swear falsely, in some cases and under some circumstances, may and ought to be admitted as witnesses in this though a Christian country (a). And on the other hand I am clearly of opinion that such infidels (if any such there be) who either do not believe a God, or, if they do, do not think that he will either reward or punish them in this world or in the next, cannot be witnesses in any case nor under any circumstances, for this plain reason, because an oath cannot possibly be any tie or obligation upon them. I therefore entirely disagree with what is reported to have been said by Lord Chief Justice *Ley* in 2 *Rol. Rep.* 346. *Tr.* 21 *Jam.* 1. *B. R.*, that in the trials of matters arising beyond sea we ought to allow such proof as they beyond sea would allow. This would be leaving this point on so very loose and uncertain a foot, that I cannot come into it; for if this rule were to hold, considering in what a strange manner justice is administered in some foreign parts, God knows what evidence must be admitted. Nor can I agree with the resolution in the case of *Alsop v. Bowtrell*, *Cro. Jac.* 541, 2. *M.* 17 *J.* 1. *B. R.* where it was holden that a certificate under the seal of the minister at *Utrecht* and of the said town of the marriage of two persons there, and that they cohabited together as man and wife, was a sufficient proof. To admit the certificate of the minister of the fact of the marriage at a place where there is no bishop might perhaps be equal and be resembled to the certificate of the bishop (b) here, which is in some cases conclusive evidence of a marriage. But I am clearly of opinion that the certificate of their cohabiting together ought not to have been admitted. For our

(a) See *John Morgan's* case, *Leach. Cro. Cas.* 58. where a Mahometan was sworn upon the Koran at the *Old Bailey*, in a prosecution for a capital offence.

(b) See a learned argument of the

late Lord Chief Justice (*Eyre*) of the Common Pleas on the subject of the Bishop's certificate of a marriage in *Ilderton v. Ilderton*, 2 *H. Bl. Rep.* C. B. 153. et seq.

1744, 5.

OMICHUND

against
BARKER.

law never allows a certificate of a mere matter of fact (a), not coupled with any matter of law, to be admitted as evidence. Even the certificate of the King under his sign manual of a matter of fact, (except in one old case in Chancery *Hob. 213.*) has been always refused; and it would be strange if we should give greater credit to the certificate of a minister at *Utrecht* than to that of the King himself. Besides it is not the best evidence that the nature of the thing will admit, but the proper and usual evidence of a fact arising beyond sea is an affidavit or deposition taken before a public notary and certified to be so under the seal of the place or the principal officer of the place, which has been admitted as evidence in some cases, where it would be too expensive, considering the nature of the cause, to take out a special commission. Before I conclude this head I must beg leave again to take notice of what is said by Lord *Hale*, that it must be left to the jury what credit must be given to these infidel witnesses. For I do not think that the same credit ought to be given either by a court or a jury to an infidel witness as to a Christian, who is under much stronger obligations to swear nothing but the truth. The distinction between the competency and credit of a witness is a known distinction, and many witnesses are admitted as competent to whose credit objections may be afterwards made. The rule of evidence is that the best evidence must be given that the nature of the thing will admit. The best evidence which can be expected or required according to the nature of the case must be received; but if better evidence be offered on the other side, the other evidence, though admitted, may happen to be of no weight at all. To explain what I mean; suppose an examined copy of a record (as it certainly may) be given in evidence; if the other side afterwards produce the record itself, and it appears to be different from the copy, the authority of the copy is at an end. To come nearer to the present case; supposing an infidel who believes a God and that he will reward and punish him in this world, but does not believe a future state, be examined on his oath (as I think he may,) and on the other side to contradict him a Christian is

(a) But see an instance to the contrary in the ancient law. 9 Co. 31. b.; Co. Lit. 74. a. "If it be alleged in avoidance of an outlawry that the defendant was in prison at *Bordeaux* in the service of the

mayor of *Bordeaux*, it shall be tried by the certificate of the mayor of *Bordeaux*." 4 Ed. 4. 10.—See also 6 D. 65 E. 619. &c.

examined,

examined, who believes a future state and that he shall be punished in the next world as well as in this, if he does not swear the truth, I think that the same credit ought not to be given to an infidel as to a Christian, because he is plainly not under so strong an obligation.

1744, 5.
OMICHUND
against
BARKER.

I have now done with the general question. And what I have said upon that must plainly shew of what opinion I am in respect to the present question; and therefore I shall be very short as to that. I think, after what I have already said, I need say nothing more to determine this point than barely to state the facts relating to it as they stand now before the court.

It is admitted that the cause is concerning a mercantile affair, which was transacted in a foreign heathen country, at *Calcutta*. It must be agreed that it is greatly to the advantage of this nation to carry on a trade and commerce in foreign countries, and in many countries inhabited by heathens and particularly in this town, in which we have established a factory for that purpose. A trade was accordingly carried on there between the plaintiff a heathen and subject of that country, and a Christian merchant a subject of *England*. It is insisted by the plaintiff that the *English* merchant, being greatly in his debt, withdrew into *England* and consequently was not amenable to the courts of justice in that country, where if he could have tried his cause this evidence which is now in dispute would have certainly been admitted. He followed his debtor into *England*, which was the only remedy that he had left, and filed his bill against him in the Court of Chancery here. No one will (I believe) now say that he had not a right to bring such a suit, or that he is not entitled to justice. For though there was such an old notion in popish times, and for some little time afterwards till the reformation was fully established, that even an alien friend especially if he were an infidel could not sue in a court of justice here, this most absurd wicked and unchristian notion has (God be thanked) been long since exploded, and will I hope never be revived again. It being admitted that he may bring his suit here, and consequently that he is entitled to justice, it follows that he must be at liberty to produce his evidence here in order to make out his case. And if he produce his evidence, it must be upon oath;
for

1744, 5.

OMICHUND
against
BARKER.

for it would be absurd to give an infidel more credit than a Christian, which we must do if an infidel's evidence be necessary in order to do justice, and yet he cannot be examined upon oath; he must therefore be examined upon oath in some shape or other. In order to obtain justice the plaintiff in this cause laid his case properly before the Court of Chancery, and prayed a commission to *Calcutta*; and the Court of Chancery, I think very rightly and with great justice, ordered a commission to go, and that the words "on the Holy Evangelists" should be omitted, and the word "solemnly" inserted in their room; and likewise very prudently directed that the commissioners should certify upon the return of the commission in what manner the oath was administered to the witnesses examined on the commission; and what religion they were of. The commissioners accordingly returned that the oath was administered to the witnesses in the same words as here in *England*, which fully answers the objection (if there was any thing in it) that the form of the oath cannot be altered; and they certified that after the oath was read and interpreted to them, they touched the bramin's hand or foot, the same being the usual and most solemn manner in which oaths are administered to witnesses who profess the *Gentoo* religion, and in the same manner in which oaths are usually administered to persons who profess the *Gentoo* religion on their examination as witnesses in the courts of justice erected by virtue of his Majesty's letters patent at *Calcutta*; and they further certified that the witnesses so examined were all of the *Gentoo* religion. This certificate, I think, fully answers the objection that it does not appear that the witnesses believe a God, or that he will punish them if they swear falsely; which (as I have already said) I admit to be requisites absolutely necessary to qualify a person to take an oath. I do not at all rely upon the books which were cited and which give an account of the *Gentoo* religion. But it is plain from the certificate itself that they believe and worship a God, and that they have priests for that purpose, which would be of no use if they did not believe that he would reward or punish them according to their deserts. The certificate likewise answers this objection, that the oath being only read to the witnesses it does not appear that they said or did any thing which signified their assent to it; for touching

touching the hand or foot of the priest after these words "so help me God," it being their usual form, is as much signifying their assent as kissing the book is here, where the party swearing likewise says nothing. And the case cited by Lord Chief Baron from 2 Sid. 6. Mich. 1657. plainly proves this, where Chief Justice Glyn was of opinion that Doctor Owens holding up his right hand was sufficient without touching the book. And Lord Stairs in his *Institutes of the Laws of Scotland*, p. 692, confirms this, where he says, "It is the duty of Judges in taking the oaths of witnesses to do it in those forms that will most touch the conscience of the swearers according to their persuasion and custom; and though quakers and fanatics deviating from the common sentiments of mankind refuse to give a formal oath, yet if they do that which is materially the same, it is materially an oath."

1744, 5.
 O'MICHUND
 against
 BARKER.

The only objection that remains against admitting this evidence is that these witnesses will not be liable to be indicted for perjury; because they are not sworn *supra sacrosancta Dei Evangelia*, which words, as was insisted, are necessary in every such indictment, and therefore they are not under the same obligations to swear truly as Christian witnesses are. But this objection has been in a great measure already answered by the Chief Baron, and it may receive two plain answers; first, that these words "*supra sacrosancta Dei Evangelia*," or "*tactis sacrosanctis Dei Evangelis*" are not necessary to be in an indictment for perjury. They have been omitted in many indictments against Jews, of which several precedents have been laid before us; and they are not in the precedents of such indictments which I find in an ancient and very good book, entitled *West's Simboleography*: but it is only there said "*supra sacramentum suum dixit et deposuit*" or "*affirmavit et deposuit*." Besides this argument, if it prove any thing, proves a great deal too much; for if there were any thing in it, many depositions even of Christians have been admitted, and many more must be admitted or else there will be a manifest failure of justice, where the witnesses are certainly not liable to be indicted; for when the depositions of witnesses are taken in another country, it frequently happens that they never come over hither,

1744, 5.

OMICHUND
against
BARKER.

or if they do cannot be indicted for perjury because the fact was committed in another country. Those therefore who are plainly not liable to be indicted for perjury have often been, and for the sake of justice must be, admitted as witnesses; and so there is an end of this objection.

From what I have said it is plain that my opinion is that these depositions ought to be read in evidence."

E. 18 Geo. 2.
Saturday,
May 18th.

EDWARD EVANS *against* HENRY KING, otherwise
HENRY VAUGHAN KING.

A declaration
on promises
against John
A., otherwise
John James
A., is bad;
for a man
cannot have
two Christian
names.

—It is a bad
plea in abate-
ment, that
the defend-
ant's name of
baptism is not
so and so.

HENRY King, otherwise *Henry Vaughan King*, of &c was attached to answer *Edward Evans*. The declaration, which was in assumpsit for work and labour, described the defendant by the name of *Henry*.

The defendant pleaded in abatement, thus; *Henry Vaughan King*, who was attached by the name of *Henry King* says that he is not nor can be understood to be the same person against whom the said *Edward* hath brought his action, because his name of baptism is *Henry Vaughan* and his surname *King*, and by the same name hath always been named and called, without this *that his name of baptism* is that of *Henry* alone, or by the name of baptism of *Henry* alone he was ever named or called &c.

The plaintiff replied that the said *Henry Vaughan* is and at the time of suing forth the original writ and long before was called and known as well by the name of *Henry* alone as by the said name of *Henry Vaughan* &c; and this he prays may be enquired of by the country.

The defendant demurred, and shewed for cause that the plaintiff replied new matter, and had concluded his replication to the country, when he ought to have concluded with an averment.

This

This case was argued on *Wednesday* the 15th of *May* by *Belfield* Serjt. for the defendant, and by *Draper* Serjt. for the plaintiff; and the opinion of the Court was now given by

1745.

EVANS
against
KING.

Willes, Lord Chief Justice (after stating the pleadings,) as follows.

"Upon this demurrer it now comes before the Court; and objections have been taken by my Brother *Belfield* to the declaration and the replication, and by my Brother *Draper* to the plea.

The objection to the declaration was, that the defendant is sued by two Christian names, whereas a man cannot have two Christian names at one and the same time; and for this my Brother *Belfield* cited *Panton v. Chowles*, *Moor* 897; *Field v. Winlow*, *Cro. Eliz.* 897; and *Watkins v. Oliver*, *Cro. Jac.* 558. The case in *Moor* of *Panton v. Chowles* is thus; the plaintiff, as administrator of *Eleanor Dancastell*, brought an action of debt against the defendant upon a bond entered into by him; he pleaded that *Eleanor* in her lifetime by the name of *Elleu* released to him all actions and demands: the plaintiff replied non est factum *Eleanoræ*, on which issue was joined, and found for the plaintiff; and upon a motion in arrest of judgment it was holden that the verdict was right, for that a person cannot have two names of baptism at the same time. But the pleadings may happen to be so that a person may be concluded by estoppel to say that his name is otherwise than that by which he has signed a deed (a). The case of *Field v. Winlow* in *Cro. Eliz.* is thus; in debt on bond the plaintiff declared that the defendant *James* by the name of *John Winlow* bound himself in a bond to the plaintiff; the defendant prayed oyer of the bond, and it appeared that the defendant had bound himself by the name of *John*, to which the defendant demurred; and all the Court held that the action lay not, for *John* cannot be *James* (b). The case of *Watkins v. Oliver*, in *Cro. Jac.* is much

(a) Vid. *Smithson v. Smith*, *E.* 17 G. 2. sup. 461.

(b) But if the defendant had been sued by the name of *John*, and had pleaded in abatement that his name was *James*, the

plaintiff might have replied that the defendant was as well known by the one name as the other, and given in evidence the defendant's signature to the bond by the name of *John*.

the

1745.

EVANS
against
KING.

the strongest of the three. There the plaintiff declared against *Edmund* alias *Edward Watkins*, that he by the name of *Edmund* was bound in a bond for 100*l.*, and for nonpayment the action was brought; the condition was that *Roger Watkins* should pay 50*l.* to the plaintiff upon such a day. The defendant pleaded payment at the day, and issue thereupon, and found for the plaintiff, and judgment for him in the King's Bench. But upon error brought in the Exchequer Chamber the judgment was reversed by all the justices and Barons, for *Edward* is bound and *Edmund* is sued, which cannot be intended to be one and the same person; and no averment can help it, for one cannot have two Christian names, and there can be no estoppel as this case is. The case of *Clarke v. Istead* in 1 *Lutw.* 894. is thus; in debt on a bond the plaintiff declared that Sir *Robert Clarke* the defendant, by the name of *John Clarke*, became bound; the defendant pleaded non est factum, and on a special verdict judgment was given in the King's Bench for the plaintiff: but it was reversed by the whole Court in the Exchequer Chamber. Many cases were cited in 1 *Lutwich* as a foundation for this reversal; among the rest the cases before mentioned and the case of *Shotbolt* in *Dyer* 279. b. *Tr.* 10 & 11 *Eliz.* There an action of debt on a bond was brought against *William Shotbolt*; and the plaintiff declared against him by the name of *William Shotbolt* alias *John Shotbolt*. The bond appeared on the evidence to be made and signed by *John Shotbolt*; and upon a special verdict found the Court were of opinion that he could not recover in that action, but that the action ought to have been brought against him by the name of *John*, and then he would have been estopped to say that his name was not *John*, he having signed the bond by that name. Another case likewise is there said to have been afterwards adjudged in the same manner between *Turpin v. Jaxon*, *Hil.* 18 *Eliz.* There is also cited in *Lutwich* the case of *Maby v. Shepherd*, where in an action of debt brought against *John* the executor of *Edmund Shepherd*, the bond set forth is said to be the bond of *Edmund*: but upon oyer prayed it appeared that he was called *Edward* in the bond, and though it appeared that he signed it by his right name *Edmund*, and though on non est factum pleaded a verdict was

(a) *Cro. Jac.* 640.

given for the plaintiff, yet judgment was arrested by the opinion of the whole Court, which was I think going a great way.

1745.

EVANS
against
KING.

I However, whatever might be my own opinion if this were a new point, I think I am obliged by these authorities, which are most of them much stronger than the present case, to be of opinion that the writ and declaration in this case are not good. For these cases are all upon bonds, where there is much more reason to say that the defendant may have two names than in the present case. For in the case of a bond if the action be brought against the defendant by the name mentioned in the bond, he is estopped to say that that is not his name; and to be sure he cannot say that his right name is not his name; so that in that case he may in some sense be said to have two names. But the defendant cannot be said in any sense to have two names in the present case, which is an action on the case upon several promises and neither of them on a note. And therefore as no man can have two names at the same time, this declaration must be wrong. As to what is said in *Salk. 6. (a)*, that a man may have two names, the one of baptism and the other at confirmation, and that after confirmation his name of baptism does not cease, no more can be meant, but that if before confirmation (for a man may not happen to be confirmed until after twenty-one) he executed any thing by his name of baptism he may be sued by that name after his confirmation. But after confirmation he has no other name but the name that he then took (*b*); otherwise the rule would not hold (which yet is certainly true) that a man cannot have two christian names at the same time.

As therefore I am of opinion that the declaration is not good, it is immaterial whether the plea or replication be good or not. But as objections have been made to both of them, I will say a little upon each.

And first, as to the plea; I am clearly of opinion that it is not good, for that it is no answer to the plaintiff's declaration. For he only says that his name of baptism is *Henry Vaughan*,

(a) *Holman v. Walden*, *Salk. 6.*

(b) See the instance of Sir *Francis*

| *Gawdy*, Chief Justice of the Court of
Common Pleas, *Co. Lit. 3. a.*

1745.

EVANS
against
KING.

and traverses that his name *of baptism* is *Henry* alone, or that he was ever called or known by that name *of baptism*, which may be true and yet his name may be *Henry*; for it may be his name of confirmation, or he may be a Jew or a Heathen. And I can find but one precedent of this sort which is that of *Sbield v. Cliff*, in *Faresley* 104; and there the plea was over-ruled, and a respondeat ouster awarded. In all the precedents in *Rastall* (a) which were cited, the defendant traverses that the plaintiff was ever called or known by that name, and there is not a word of baptism in any of them. And the plea in 1 *Lutw.* 10, from which it was said that this was copied, is quite different from this; for there the traverse is in these words, *absque hoc quod ipse nominatur vel vocatur Robertus seu per idem nomen vel cognomen unquam cognitus seu vocatus fuit &c.*, and not a word of the name *of baptism*.

Being clearly of opinion that the plea is bad for this reason, I shall say nothing of the other objection to it, that it begins with saying that the defendant was attached by the name of *Henry King*, which is contrary to the declaration.

And being of opinion that the declaration and plea are both bad, I will give no positive opinion on the replication, but I am inclined to think that that is bad likewise for the reason assigned as cause of demurrer; for the plaintiff having alleged new matter, and not barely denied the defendant's plea, he ought to have given the defendant an opportunity of answering it, and so not to have concluded to the country but with a *hoc paratus est verificare*. The case of *Holman v. Walden*, *Salk.* 6. can be no authority in the present case either on the one side or the other, because there the declaration plea and replication were all different from the present. The defendant is named but by one name in the writ and declaration; in the traverse which is the material part of the plea there is not a word of the name of baptism; and there the replication exactly follows the words of the traverse, and therefore a conclusion to the country was proper. Besides, as the case is reported, I cannot help saying that it is a single case.

(a) *Rast. Entr.* 50; 108; 334.

But upon the strength of the authorities which I have mentioned, I am of opinion that the declaration is not good, and that judgment in abatement must be given for the defendant, that the plaintiff's writ be quashed."

1745.

EVANS
against
KING.STONE *against* RAWLINSON and Another.E. 18 Geo. 2.
Monday,
May 27th.

THIS was an action on a promisory note for fifty guineas made by the defendants dated the 11th of *May* 1730, and payable to *James Watson* or order; and the declaration stated that *Watson* died on the 1st of *April* 1734 intestate, upon whose death administration of his goods and chattels was granted to *Ann Webb*, who indorsed the note to the plaintiff.

The executor or administrator of a person; to whose order a promisory note is made payable, may assign it over, so as to enable the indorsee to sue in his own name.

To this declaration the defendants demurred, and shewed for cause that the plaintiff did not bring into the Court, or shew to the Court, any letters of administration of *J. Watson's* goods granted to *Ann*, and that he did not shew who granted administration of *Watson's* effects to the said *Ann*.

—But the indorsee need not in his declaration make a profert of the letters of administration &c granted to the indorser.

This case was twice argued, the first time in *Michaelmas* term 1744 by *Agar* Serjt. for the defendant, and *Draper* Serjt. for the plaintiff, the second in *Hilary* term following by *Birch* King's Serjt. for the former and by *Prime* King's Serjt. contra. And though Mr. *J. Burnett* appears at first to have been inclined to give judgment for the defendant, he afterwards agreed with the rest of the Court, whose opinion was now delivered, as follows, by

Barnes 164.
S. C.

Willes, Lord Chief Justice. "This comes before the Court on a demurrer to the plaintiff's declaration.

There are two causes of demurrer assigned in the pleadings, 1st, That there is no profert made of the letters of administration;

2dly, That it is not said by whom the letters of administration were granted, so that it does not appear whether they were granted by proper authority.

And

1745.
STONE
against
RAWLINSON.

And a third was made at the bar, that an executor or administrator cannot assign a promisory note made payable to a person or order so as to enable the indorsee to bring an action on such note in his own name by the statute, 3 & 4 Ann c. 9.

As to the two first objections, which are the only causes assigned in the demurrer, we have given our opinions before.

For as the letters of administration cannot be supposed to be in the custody or power of the indorsee, he ought not to be obliged to produce them (a); and for the same reason he need not shew by whom they were granted: but if the defendant stand trial, the plaintiff must not only produce the letters of administration in evidence, because it is the title under which he claims, but must likewise shew whether they were granted by a Court or a person having a legal authority so to do, otherwise he cannot recover.

The third point therefore, and the only one which remains to be considered, is whether the executor or administrator of a person, to whom or to whose order a promisory note is made payable, can assign over such note so as to enable the indorsee to bring an action upon it in his own name. And as it was insisted on the one hand that though this has been frequently done by persons concerned in trade yet it had never been controverted before, so it was admitted on both sides that there has never been any judicial determination upon this point either one way or the other. And though several cases were cited as bearing some resemblance to this, I think that none of them were at all material in this case, except the case of *Moore* and *Manning* in *Comyns* 311. and 312., of which I shall take notice presently.

(a) Vid. Bro. Abr. tit. "Oyer de Records" pl. 10; 5 Co. 75. a. *Wywarke's* case; 10 Co. 94. b. *Dr. Leyfield's* case; Cro. Car. 209. *Gray v. Fielder*; Cro. Jac. 70. *Dagg v. Penkevon*; 1 Lutw. 481. *Crotch v. Crotch*; 3 Lev. 83. *Carver v. Pinkney*, Carth. 316; *Reynel v. Long*, and *Whitfield v. Fausset*, 1 Vez. 394.—Where an action is brought against an administrator, if he plead a bond debt due to himself and a retainer to that amount, he

need not set out the letters of administration, because the plaintiff by his declaration admits him to be lawful administrator. *Picard v. Brown*, 6 D. & E. 550. Secus, if the plaintiff sue him as executor, and he claim to retain a bond debt to himself as administrator; for there he claims in a different character from that which the plaintiff gives him. *Caverly v. Ellison*, Sir T. Jon. 23.

As this is a matter which greatly concerns the trade and commerce of the nation, and as it has never been judicially determined before, we thought ourselves at liberty and that it was the properest method we could take to inquire of traders and merchants of undoubted credit what has been the practice in this case ever since the act of the third and fourth of Queen *Ann*, and how the act has been understood by them. We have done so, and they all agree that it has been the constant practice for executors and administrators to indorse such notes and inland bills of exchange; and that promisory notes when so assigned have always been considered to be as much within the statute, and that they may be put in suit by the indorsee in the same manner as if they had been indorsed by the testator or intestate. As therefore we are fully satisfied that this has been the constant practice, and that the law has been always so understood amongst traders, and as the Courts of law have always in mercantile affairs endeavoured to adapt the rules of law to the course and method of trade in order to promote trade and commerce instead of doing it any hurt, so we are determined in the present case to make this indorsement valid according to the practice, if we can by any means make it consistent with the words of the act and agreeable to the rules of law. And we think it is easy to do both.

1745.
STONE
against
RAWLINSON.

The words of the act, when considered, will I think plainly warrant it, I mean the following words in the first section of the act, "That any person, to whom a promisory note that is payable to any person or his order is indorsed or assigned, or the money therein mentioned ordered to be paid by indorsement thereon, shall and may maintain an action for such sum of money either against the person signing such note, or against any of the persons who indorsed the same, in like manner as in cases of inland bills of exchange." What was the practice before and since as to inland bills of exchange we can only learn from the report of merchants, and they unanimously agree that they were always looked upon to be so assignable by executors and administrators as to enable the assignee to bring an action in his own name. And I think this construction agreeable to the plain intent of the act, which is that whereas the assignee of such notes before had

1745.

STONE
against
RAWLINSON.

certainly an equitable interest, which would enable him to bring an action in the name of the assignor, such equitable interest by the statute was converted into a legal interest, so as to enable the assignee to bring an action in his own name. It must be admitted that the whole interest to the testator or intestate in such notes vests in the executor or administrator; and that before the statute the executor or administrator might have assigned all his right in such notes so as to convey an equitable interest to another, and to enable him to sue in the name of the executor or administrator (a). If therefore by the statute such equitable interest is converted into a legal one, it follows that since the statute such assignee may sue in his own name. And I think that the case of *More and Manning*, 5 G. 1., in this court and reported in *Comyns* 311 and 312, which was the only case that was cited, which seems to bear any resemblance to this, plainly warrants this construction. A promissory note drawn by *Manning* was made payable to *Statbam* or his order; *Statbam* assigned it to *A.* and *A.* to the plaintiff; on a demurrer to the declaration, the exception was that the assignment was only to *A.* not saying to him or order, and therefore he could not assign it to the plaintiff. And to this the Chief Justice at first inclined; but afterwards it was resolved by the whole Court that it was good. For if the original note were assignable, it will always remain so; and whoever has the whole interest in the note may assign it as he pleases.

On the strength of this case I think I may make a syllogism, which will be conclusive in the present case. Whoever has the absolute property in a bill made payable to one or his order may assign it as he pleases within the provision of the statute, and such assignee may maintain an action in his own name; the executor or administrator of a person, to whom such bill is made payable, has the absolute property in it, and therefore he may assign it to whomsoever he pleases, and such assignee may maintain an action in his own name; which is the only question that remains to be determined in the present case.

(a) In *King and Others, Executors of Stevenson, v. Thorn*, 1 D. & E. 487. it was holden that if the payee of a bill of exchange indorse it to *A.* and *B.* as executors of *C.*, they may declare as such in an action on the bill.

And

And we being all of that opinion, judgment (a) must be for the plaintiff."

(a) This judgment was afterwards affirmed on a writ of error in the Court of King's Bench, *M. 20 Geo. 2. 2 Str. 1260*; 3 *Wils. 1*; and 2 *Burr. 1225*.

1745.

STONE

against

RAWLINSON

WATKIN WILLIAMS WYNNE and CORBET KYNASTON Esq. Demandants against WILLIAM THOMAS Tenant, and JAMES APPERLEY B. D. and ALATHEA his Wife Vouchees.

E. 18 Geo. 2.

Monday,

May 27th.

A WRIT of error was brought in the Court of King's Bench to reverse a common recovery suffered of lands in *Shropshire*, of which *Alathea Apperley* was tenant in tail, in which recovery *Watkin Williams Wynne Esq.* and *Corbet Kynaston Esq.* were demandants, *William Thomas* tenant, and *James Apperley* and *Alathea* his wife vouchees, who vouched the common vouchee. The error assigned was that *Alathea* died before the giving of judgment in the recovery. And issue having been joined on that fact, the cause was tried at the Summer Assizes at *Shrewsbury* 1741, where a special verdict was found, stating (inter alia) that *Alathea* died on the 10th of May 1740, which was six days before the return of the writ of summons.

The Court will amend a recovery whenever it can be done consistently with the rules of law.

—But they cannot amend the teste of a writ of entry where it is not the misprision of the clerk and where there is nothing to amend by.

—The common vouchee cannot appear by attorney before the day of the return of the writ of summons.

—If the vouchee die before the return of the writ of summons, the recovery is erroneous.

Barnes 17.

7 Mod. 492.

ost. ed. S. C.

This special verdict was argued in the Court of King's Bench in *Mich. 17 Geo. 2.* (vid. 1 *Wils. 35.*) In *Hilary* term following that Court was about to pronounce judgment of reversal, (vid. 1 *Wils. 42.*) but the parties claiming under the recovery desired that the judgment might be suspended until a motion was made in this court to amend the recovery.

Such a motion was accordingly made, and the question was several times argued by *Willes* King's Serjeant and *Wynne* and *Hayward* Serjeants in support of the rule, and by *Skinner* and *Prime* King's Serjeants and *Boole* Serjeant against it; and on this day the opinion of the Court was delivered, as follows, by

Willes, Lord Chief Justice. "This comes before the Court on a motion to amend the recovery.

I shall

1745.

WYNNE
against
THOMAS.

I shall first state how the recovery now stands;

Secondly, how the fact really was;

Thirdly, what are the amendments that are desired.

First, The recovery is of *Easter* 1740. The writ of entry was returnable quind. *Pascb.* which in that year was the 20th of *April*, so the 23d was the appearance-day; on which day (as the record now is) it is said that *William Thomas* appeared in his proper person and vouched *J. Apperley* and *Alathea* his wife, whereupon a writ of summons ad warrantizandum was awarded, returnable on the morrow of the *Ascension*; so, as this recovery now stands, it could not be suffered before the morrow of the *Ascension*, which was the 16th of *May* in that year.

Secondly, The fact as it appears in the deed and by affidavits is, the writ of entry tested the 2d of *April*, returnable the 20th. The writ of summons ad warrantizandum issued on the 23d, returnable the 16th of *May*; and it could not be made returnable sooner, because there must be five returns inclusive between the teste and return. Before the stat. 16 *Car.* 1. c. 6. nine were necessary, but by this statute they are reduced to five. The dedimus to take the warrant of attorney was tested 25th of *April*; the warrant of attorney was executed by *J. Apperley* and his wife on the 30th, and the mittimus by which it was sent out of Chancery into this court was tested 8th *May*. *Alathea* died on the 10th *May*. And the recovery was in fact arraigned at the bar on the 5th of *May*, but *Alathea* never appeared in person, and therefore every thing that was done was done under the authority of the warrant of attorney. The deeds of lease and release to make a tenant to the præcipe, and in which there was a covenant to suffer a recovery and a declaration to the uses, bore date the 1st and 2d of *February* and were proved to be executed about that time. The objection to the recovery was that *Alathea* was dead before the 16th of *May*, on which day (as it now stands on record) it must be taken the recovery was suffered.

Thirdly, The amendments, which were desired, were of two sorts, either of which it was said would cure the defect in the recovery.

It, It was desired that instead of these words "at which day come *Watkin and Corbet*" &c, these words might be inserted, "before which day, on the 5th day of May in the same term, here cometh as well &c."

1745.

WYNNE
against
THOMAS.

ordly, The other amendment was, that the teste and the return of the writ of entry might be altered, so as to make it returnable *crastino Purificationis* in *Hilary* term, and then the summons ad warrantizandum might be made returnable the 4th of May, which was the third return in *Easter* term, and then the vouches might appear by attorney on the 5th of May, and all would be right. And a multitude of cases were cited to shew that this Court, in favor of common recoveries, has from time to time made many great alterations in recoveries in order to make them good. But I shall have occasion to mention but few of those cases, because we agree with the general determination, that as common recoveries are now become the common assurances of the nation, this Court will always make such amendments and alterations in common recoveries as to make them good and effectual if possible. But such amendments must be consistent with the rules of law, and there must always be something to amend by.

Before I consider the amendments proposed, I will lay one thing out of the case as quite immaterial, though it was often said and much insisted on by the counsel for the amendment, which is, that these warrants of attorney are in their nature irrevocable, and cannot be revoked without leave of the Court, because whether this be true or not (but I am very far from admitting that it is) it is nothing to the present case. If any argument could be drawn from it, it was most proper in the King's Bench, to shew that the record, as it stands, is right, and that it does not want an amendment. But it can afford no argument in either court. For whether the warrant of attorney were revocable or not by *Alathea* in her lifetime, it was certainly revoked by her death, and her attorney could not appear for her and in her stead after she was dead.

Having therefore laid this argument out of the case, I will now consider the first amendment proposed. As the recovery,

1745.

WYNNE
against
THOMAS.

was proved to be in fact arraigned at the bar of this court on the 5th of *May*, I think there is sufficient foundation in fact to make this amendment; but that will do the parties no good; for we are clearly of opinion that the record, when so altered, will be as bad nay worse than it was before, and we will not amend one error by making another; for the vouchee cannot appear by attorney before the day of the return of the writ of summons ad warrantizandum. The two cases which were cited plainly prove this, and besides the reason of the case shews it. The case in 1 *Leonard* 86. is express to this purpose, that in common recoveries the vouchee cannot appear by attorney but upon the day of the return of the summons ad warrantizandum. The authority of this case was attacked by saying that this is an anonymous case, and only an obiter saying upon a question put to the Court by Serjt. *Walmesley*, which was not unusual in those days. But I think it is a great authority, as it is there said that this was the clear opinion of all the Judges and Prothonotaries, and because it has never been contradicted in any case since, and likewise because it is warranted by a very ancient case and a case of great authority in 11 *Hen. 4.* 28. *Bro. Abr.* title "*Jour*" fo. 39. b. (a), where it is expressly said that the vouchee cannot appear by attorney but at the day given by the process. But to this case likewise it was objected that it does not appear by this, whether it was a common recovery or an adverse suit: but I think this will make no difference, for these rules concerning the process must be the same in common recoveries as in adverse suits, as appears plainly by the statute 16 *Car. 1. c. 6*, which puts adverse suits and common recoveries on exactly the same foot in respect to the five returns. Besides this rule in the present case is justified by reason and the fact as it is now laid before the Court. For it is admitted that the vouchee did not appear in person either at the day of the return of the writ of entry or at any time afterwards, the consequence of which is that there must be a summons ad warrantizandum, and that the appearance must be by attorney; and if so, there is no day given in court, on which the party could appear by attorney but on the day of the return of the summons. It would make the law ridiculous that there must be five returns between

4a) Pl. 79.

the

the teste and the return of the summons ad warrantizandum, if the vouchee might appear by attorney at any time before the return.

1745.

WYNNE
against
THOMAS.

The case which was much relied on, and which was the only one which was cited, which seems to bear any resemblance to this, is the case of *Winne v. Lloyd*, P. 16 C. 2., upon a writ of error in B. R., reported in 1 *Lev.* 130. 1 *Sid.* 213. and in several other books: but we think that it is no authority in respect to the present amendment which is desired; first, because it is very difficult to know how that fact stood, it being very differently reported in almost every book; secondly, because there is no pretence there, that the vouchee appeared by attorney before the day given in court, but the objection is that either the warrant of attorney or dedimus was not tested in due time. Besides that was a question that did not arise on a motion for an amendment in this court, but upon a writ of error in the Court of King's Bench. If therefore that case be of any weight, it may be and to be sure will be considered in the Court of King's Bench. Besides I must own that I have no great opinion of the determination in that case if it be as it is reported: however it is enough to say that it is not parallel to the present case. We cannot therefore agree to make the first amendment that is proposed, because we are satisfied that it would not make the recovery at all better than it is at present.

As to the second amendment, I am clearly of opinion, that it would make the record right, and cure all the errors of this recovery, if we were warranted to make it by the rules of law and by the facts which have been laid before us. But we think that we cannot do it by the rules of law, or if we could that there is nothing to amend it by; for the facts are so far from warranting such an amendment, that they plainly shew that we ought not to make any such alteration.

The cases which were chiefly relied on as to this point were three precedents mentioned in *Pigot on Recoveries*, p. 173 and 174. In all these three cases the Court ordered the return of the writ of entry to be altered, because it was made returnable before the date of the deed which made the tenant to the præcipe, which

1745.

WYNNE
against
THOMAS.

which at that time was held to be a fatal error. Though it has been since holden in favour of recoveries, that if there be a good tenant to the præcipe at any time before judgment is given, it is sufficient (a). But these cases do not come up to the present; for they are only instances that this Court will amend the *return* (b) of the writ of entry and not that it will amend the *teste* of it, which is necessary to be done and is what is desired in the present case. Besides the rule itself has been produced to us in the first precedent in *Pigot*, which is that of *Bunce and Greenway*, M. 4. W. and M., and it appears by that that it was the misprision of the clerk; that the deed in which it was covenanted to suffer the recovery warranted this amendment, and that besides it was made by consent of all parties; and probably if the other two precedents could have been found it would have appeared that they were attended with the same circumstances. However they are only authorities that the *return* of the writ of entry may be amended, but not that the *teste* may be altered. But I own that many authorities were cited to this purpose, to shew that originals may be amended, and even in the *teste*. It will be unnecessary to mention many of them, because I admit in general that originals may in many cases be amended, when returned into this court, and that the *teste* of them may be amended in some instances. But there is no case which warrants such an amendment as is desired in the present case. *Gage's* case, as reported in 5 Co. 45. b., comes the nearest to the present; but it is not rightly reported by Lord Coke, and it has been contradicted in many cases since, and held not to be law. The true rule is, that original writs may be amended by 8 H. 6. c. 12. where it is only the misprision and negligence of the clerk, but a mistake occasioned by the nescience or ignorance of the clerk is not amendable by that statute, nor any

(a) By stat. 14 Geo. 2. c. 20. it is enacted that every recovery shall be valid, notwithstanding the fine or deed making the tenant to such writ is levied or executed after the time of the judgment given in such recovery and the award of the writ of seisin, provided it be levied or executed before the end of the term in which the recovery is suffered. And on the construction of that act it has been holden that

a recovery is good if the deeds be executed in the term in which it is suffered, though the deeds to make the tenant to the præcipe be not executed until after the execution of the writ of seisin. *Goodright v. Rigby*, 4 Durnf. & East 177.

(b) In *Watson v. Lockley*, 2 Will. 2. an amendment was made in the *return* of the writ of seisin, the error being the misprision of the clerk,

other

other mistake, when there is nothing to amend it by. This distinction is warranted by *Blackmore's case*, 8 Co. 159. b. 160. a., and many other authorities. Where therefore the teste is void, as when it is made on a *Sunday* or in vacation-time, there it is amendable as the plain misprision of the clerk; and so it is held in the case of the *Queen and Tutchin*, 2 Lord Raym. 1066, and in 5 St. Trials 543, where many cases are cited for that purpose. And if *Gage's case* were law, an impossible teste might be likewise amended for the same reason; for the teste in the writ of covenant there was after the return. But *Gage's case* is otherwise reported in *Moor* 571. that this mistake was held not to be amendable, and that the fine was reversed on a writ of error for that reason, and it has been found upon searching the record that the report in *Moor* is right (a). But I own if this point were to come as a new question before me, I should be of the same opinion with Lord Coke, who often gives his own instead of the opinion of the Court. But I am borne down by very great authorities, by the authority of the House of Lords and of all the Judges in the case of *The Earl of Pembroke and Lord Jeffereys*, as appears by the case before mentioned in 2 Lord Raym. 1066, and in that case as reported in 1 Salk. 52., where it is expressly said that *Gage's case* is not law; and the same was again confirmed by the opinion of the Court of King's Bench in the case of the *Queen and Tutchin*. I will mention the very words that the Judges certified by Lord Chief Justice Holt to the House of Lords (as they are reported by *Salkeld*) being very applicable to the present case. That was the case of a fine; and the writ of covenant was tested six months after the dedimus for the caption, and the Court of Great Sessions in *Wales* had amended it; but it does not appear whether the teste was before the return or after: but Lord Holt certified "that the writ of covenant being an original" was not amendable either by the common law or by any statute; that neither the 14 E. 3. nor 8 H. 6. warranted such an amendment; and that there was no difference as to that purpose between actions amicable and adversary. For no one pretends to amend a mistake in a deed, and yet that surely is as much a common assurance as a recovery; and that *Gage's case* in 5 Co. 45. is misreported and not law." I fancy Mr. *Salkeld* has not rightly stated the certificate at the

1745.

WYNN
against
THOMAS.

(a) See also 6 Mod. 196.

1745.
 WYNNÉ
 against
 THOMAS.

beginning; for Lord *Holt* could not say in general that no original was amendable; but the words of the certificate probably were, that the writ being an original *was not amendable in that instance*; and I only rely on the latter words, which are very strong to my present purpose. But if *Gage's* case were law, yet neither that nor any other case which I can find would warrant the present amendment. For here is not the least pretence that there was any mistake misprision or nescience in the clerk, but the teste and return are both very proper ones, and the writ was certainly made out according to the instructions which he received. Which leads me to the other point,

That if we could make this amendment by the rules of law, yet that there is nothing to amend by; for the deeds which have been read and referred to plainly shew that it was not the intent of the parties that such a writ of entry should be sued out as is now desired, but such an one as has been sued out and as now appears on the record. The deed of release says that the recovery shall be suffered before the end of *Easter term next ensuing or any other subsequent term*; so there is no pretence to say that the parties intended to have a recovery in *Hilary* term, or that the writ of entry should be sued out sooner than it was: whereas if it were to be tested as is now desired, it must not only be tested long before the date of the deed, as it is to be returnable the very day after it, but likewise if the vouchees had appeared in person on the day of the return (being the third of *February*) and which they might have done if they would, if such writ of entry had been sued out, the recovery would have been a recovery in *Hilary* term, expressly contrary to the agreement of the parties.

We think therefore that we cannot consistently with the rules of law and justice make the second amendment which is desired. I do not know that in a court of law we are at liberty to shew any favor: but if it were in a court of equity, where sometimes favor may be shewn consistently with the rules of justice and equity, yet as here is an heir on the one side and a mere volunteer on the other, if any favor could be shewn, it must be to the heir, for a volunteer is entitled to none.

We

We are therefore all of opinion that we cannot amend the recovery, and that this rule must be discharged (a).

(a) Vid. *Swann v. Broome*, 3 Burr. 1595; and 1 Bl. Rep. 496; 526.

1745.

WYNNE
against
THOMAS.

HENRY LAYNG Executor of HENRY LAYNG against
JOHN PAINE and FRANCIS PAINE, Executors of
JOHN PAINE.

T. 18 & 19
G. 2.
Wednesday,
July 3d.

DEBT on a bond given by the defendants' testator to the plaintiff's testator in 1000*l.*, dated the 3d of September 1720.

The defendants cravedoyer of the condition of the bond; it recited that the plaintiff's testator who was Archdeacon of Wells, had by his letters patent bearing date with the bond granted to *John Paine* and *H. Layng* his own son the office of register or scribe of the Archdeaconal Court of the Archdeaconry of Wells with the fees and profits thereof for their lives and the life of the survivor; and that the name of *John Paine* was only used in trust to and for the use and benefit of *Henry Layng* (deceased) his executors &c, and that he (*J. Paine*) had not paid any of the fees and charges expended in and about the said patent &c; and the condition was that *J. Paine* should permit *H. Layng* (deceased) his executors &c to receive to his and their own use all the profits and emoluments issuing or to be made by the said office during the life of *J. Paine*, and should without any consideration or reward at the request and costs of *H. Layng* (deceased) his executors &c make and execute any deputation grant or surrender and do and execute any lawful act about the said office the execution and the profits thereof to such person as *H. Layng* (deceased) his executors &c should desire or appoint &c.

A bond given by any of the officers mentioned in the stat. 5 & 6 Ed. 6. c. 15. for securing all the profits of the office to the person appointing, is void by that statute. — So is a bond given by such an officer to surrender whenever the person appointing chose. — The office of register of an archdeaconry is an office within that statute.

The defendants then pleaded, 1st, a performance of both parts of the condition by *J. Paine* deceased; 2dly, that the office of register &c was an office which touched and concerned the administration and execution of justice; and that the bond for

1745.

LAYNG
against
PAINE.

that cause, being contrary to the form of the statute &c, was void in law.

The plaintiff tendered issue on the first part of the first plea, namely, that *J. Paine* had not suffered and permitted *H. Layng* &c to receive and take to his own use all the profits &c, and demurred to the second plea; and the defendants joined in demurrer.

The case was twice argued, the first time by *Draper* Serjt. for the plaintiff, and *Belfield* Serjt. for the defendant; and the second time by *Eyre* Serjt. for the former, and *Prime* King's Serjt. for the latter.

After the Court had taken time to consider of this case, their opinion was on this day delivered by

Willes, Lord Chief Justice, (after stating the pleadings,) as follows.

"Upon this demurrer to the second plea the case now comes before the Court. And the single question is whether this bond by reason of the condition be a void bond or not.

It was insisted on by the defendants that it was void both by the common law and the statute 5 & 6 *Ed. 6. c. 15*. Whether or no it would have been void by the common law we need give no opinion, because we are all clearly of opinion that it is made void by the statute.

The words of the statute are "If any person or persons at any time hereafter bargain or sell any office or offices, or deputation of any office or offices, or any part or parcel of any of them, or receive have or take any money fee reward or any other profit directly or indirectly, or take any promise agreement covenant bond or any assurance to receive or have any money fee reward or other profit directly or indirectly for any office or offices, or for the deputation of any office or offices or any part of them, or to the intent that any person should have exercise or enjoy any office or offices or the deputation of any office or offices

offices or of any part of any of them, which office or offices or any part or parcel of any of them shall in anywise touch or concern the administration or execution of justice &c;" then follows a description of other offices not material to the present question; and then the statute goes on and inflicts several forfeitures and incapacities both upon the persons buying and the persons selling any such office or offices. Then follows in the third section of the act the clause, upon which the present question depends; "that all and every such bargains sales promises bonds agreements covenants and assurances shall be void to and against him and them to whom such bond &c shall be had or made."

1745.

LAYING
against
PAINES.

That this is an office which concerns the administration and execution of justice (a) is admitted. If it were a new case, I should have had no difficulty in determining it to be so: but it has been so determined several times, particularly in a very solemn manner in *Dr. Trevor's case*, *Cro. Jac.* 269, and *12 Co.* 78, where the Lord Chancellor referred it to all the Judges, who were of opinion that this office was within the stat. *Ed.* 6. The same was likewise determined in the case of *Woodward v. Foxe* in the case of the register of an Archdeacon, *3 Lev.* 289; and *2 Ventr.* 187.

The only question that remains is, whether this condition be within the provision of the statute, and makes the bond void; and we think it plainly within the words and provision of the statute.

First, An agreement to have all the profits is certainly an agreement to receive *some profit*, which is contrary to the words of the statute.

Secondly, This is directly contrary to the intent of the statute.

There were two principal reasons for making that statute; 1st, That offices might be exercised by persons of skill and in-

(a) In the case *Ex parte Butler, Amb.* | statute does not extend to offices concern-
73, and *1 Atk.* 210. it was holden that the | ing the police.

1745.

LAYNO
against
PAINE.

tegrity; and 2dly, That they might take only the legal fees; for those who buy their offices will be apt to make more than their legal fees, according to what is said in 3 *Inst.* 148, "they that buy will sell." Both these ends will be frustrated if this condition were good. For either this *John Paine* must execute the office for nothing, or he must take more than his legal fees; for he was to account to the Archdeacon for all the legal profits. No man of skill and integrity will throw away the greatest part of his time in executing such an office for nothing; and if he has any thing for it, it must be extortion and by taking illegal fees; and so the second and principal end of the statute would be plainly eluded.

As we are of opinion that the first (a) condition of the bond is plainly void and illegal, we need go no further, both because the breach in the present case is assigned on that part of the condition, and likewise because it has been holden that if any of the conditions be void by a statute, the whole bond is void. So it is expressly determined in the case of *Norton v. Syms*, *Moor* 856. (b), and in the case of *Lee and his Wife v. Colebill*, *Cro. Eliz.* 529., and in several other cases.

But however as the second (c) condition has been spoken to, I will say a word as to that. And I think likewise that this is a void condition; for the donor to oblige the officer to surrender whenever he requires it is to reserve to himself an absolute power over his officer, which he ought not to do. Besides, if this were allowed, there would be a plain method chalked out to evade the statute; for any one by this mean might sell an office for the full value. For let such a condition be put in, let the bond be given for the full value of the office, and let it be agreed between them that the officer shall refuse to surrender upon request, and then the grantor will recover on the bond,

(a) The first branch of the condition.

(b) A distinction is there taken between covenants or conditions void by the common law and those that are void by statute. It is said, when some covenants in an indenture are void by the common law, and the others good, a bond for the performance of all the covenants may be good as

far as respects the covenants that are good: but otherwise if any of the covenants be void by the statute, there the bond is void in toto. See also 1 *Mod.* 35, 36; and *Roe v. Galliers*, per Buller J. 2 *D. & E.* 139.

(c) The second branch of the condition.

and

and so have the full value of the office. This is so very plain, and so directly contrary to the words and intent of the statute, that I need not say any thing more upon it.

1745.

LAYING
against
PAINE.

This case was compared by the counsel for the plaintiff to the case of simoniacal bonds, and to be sure the comparison is a very just one: but it makes directly against the plaintiff; for it has been holden that a bond given by a parson to his patron to resign generally, (as the present case is,) and not to a particular person, is void (a). And no one (I believe) can doubt but that if a man were to give a bond to his patron with a condition that the patron should receive the whole profits of the living, such bond would be simoniacal and void. The case of *Bellamy v. Burrow* (b) is a case of very little authority, and very little resembles the present case; 1st, Because it occasioned different opinions (c); and 2dly, Because it was never carried into execution. *Bellamy* there did not grant the office; but the King granted it in trust for *Bellamy*, and the King certainly is not within the statute (d). The cases likewise of *Gulliford v. Cardonell* (e), *Salk.* 466, and *Godolphin v. Tudor*, *Salk.* 468. (f), which

(a) When this case was determined, *Tr.* 18 & 19 *Geo.* 2., this appears not to have been so considered: general bonds of resignation were then holden to be good. *Vid. Babington v. Wood, Cro. Car.* 180. and *Sir W. Jon.* 220; *Watson v. Baker, Sir T. Raym.* 175; *Wyndham v. Bowen, Say.* 141; *Peele v. The Countess of Carlisle, 1 Str.* 227; and *Grey v. Heslith, Ambl.* 268. However in a late case in the House of Lords, *The Bishop of London v. Ffytche, May* 1783, on a writ of error, a general bond of resignation was declared void, contrary to the opinion of all the Judges, except *Eyre C. B.* (late Lord Chief Justice of the Common Pleas;) and they reversed the judgment in *B. R.*, affirming that before given in *C. B.*—But see *Bagshaw v. Bosley, 4 D. & E.* 78; and *Partridge v. Whiston, ib.* 359.

(b) *Caf. temp. Talb.* 97.

(c) In that case the Master of the Rolls decreed that Mr. *Burrow* should hold the office in his own right: but on an appeal this decree was reversed by the Lord

Chancellor, who ordered that Mr. *Burrow* should account for the profits of the office.

—See also Lord *Loughborough's* observations on that case, in 1 *H. Bl. Rep.* 333.

(d) *Vide Huggins v. Bambridge, H. 14 G. 2. Sup.* 241.

(e) *Com. Rep.* 1; and 12 *Mod.* 90. *S. C.*

(f) And 6 *Mod.* 234. *S. C.* But the following manuscript note of that case is more full than either of the printed accounts of it.

“*Godolphin v. Tudor, M. 3 An. B. R.* Debt upon a bond. Oyer of the bond and of the condition, which was for the performance of certain articles; and reciting that whereas Sir *William Godolphin* was auditor of *Wales* for his life, he did depute the defendant's intestate to be his deputy therein, and made him a grant of all the fees perquisites and profits thereunto belonging, the deputy paying him 200 *l.* a-year: if the said intestate should accordingly pay that 200 *l.* a-year, then the bond to be void.

“To

1745.

LAYNG
against
PAINE.

which were likewise cited for the plaintiff, are quite different from the present case. In both those the principal officer having an office, of which by law he might make a deputy, made a deputy, reserving in one case half the profits of the office, and in the other a certain sum not saying out of the profits: in the first case it was holden good, and in the second bad; but in the latter it was said that it would have been good if the sum had been reserved out of the profits; because if a man may by law make a deputy he must allow him something, and it can never be thought that he is to give him the whole profits. Besides, notwithstanding the deputation, he may execute the office whenever he pleases. But in the present case the Archdeacon could not execute the

"To this the defendant pleaded the statute of *Edu. 6.* against selling offices, and for making bonds and securities given to enforce such contracts void; and concluded with proper averments to shew this office within the statute.

"The plaintiff replied that the fixed salary of the said office was 20 *l.* a-year, and the just and legal profits 329 *l.* per annum, which the defendant's intestate during his life received annually.

"The defendant demurred; and judgment was for him, that the bond was void by the statute.

"This was settled upon great consideration after three arguments, wherein it was agreed that if an officer has a certain annual salary, or other profits amounting certainly to such a sum annually, a deputation of such office with a reserve of any sum out of it not exceeding the certain profits is no sale contrary to this statute. So if a deputy be appointed to an office consisting of uncertain profits, paying out of such profits any sum whatever, this deputation and contract for payment are good, because the deputy is to pay out of the profits only and cannot be charged for more than he receives. In these cases the principal does in effect only appoint a deputy, reserving to himself a part of the profits which are by the law his entirely,

and do not pass as incident to the deputation any farther than as they are expressly granted with it. Such deputations therefore are not sales of offices contrary to the statute, but only grants of them and of the profits qualified with some exceptions.

"But if an office consisting of uncertain fees be granted to a deputy together with all its fees, reserving a certain sum, such grant will be void; for it is not a deputation with a reserve of part of the profits, but an absolute disposition of the office and all the profits in consideration of a certain sum to be paid annually for them; whether the profits themselves amount to more or less (1), and is therefore in the nature of a sale prohibited by the statute.

"This case is not altered by any subsequent event of the office answering more in the contingent profits than the money stipulated to be paid for them; because the contract is to be adjudged ab initio good or bad according as it appears restrained by the statute or not, and is not to depend upon contingent consequences.

"Judgment for the defendant, which was afterwards confirmed in the House of Lords." MS. coll. *Willes* Chief Justice.

(1) *Juxton v. Morris*, cited by Lord Loughborough, in 1 *H. Bl. Rep.* 332. S. P. office

office himself, but had only a power of granting it, and therefore there is no pretence that he should receive any of the profits.

1745.

LAYNE
against
PAINE.

For these reasons we are all of opinion that this bond is void by the statute; and therefore judgment must be for the defendants (a)."

(a) A Court of Equity has in some cases interposed where it has been thought the Courts of Law could not. *Law v. Law*, *Cas. temp. Talb.* 140; and 3 *P. Wms.* 391; *Morris v. McCulloch*, *Ambl.* 432; and *Hancington v. Du Chattel*, 4 *Bro. Ob. Cas.* 124.—See also the cases of *Parsons v. Thompson*, 1 *H. Bl. Rep.* 322; and *Garforth v. Fearon*, *ib.* 327; in the former of which it was holden that an agreement by the defendant to allow the plaintiff a certain proportion of the profits of an office (not within the statute *Ed. 6.*) in consideration of his assisting in procuring the defendant's appointment to it was void; and in the latter, that, where the defendant had declared that his name was only used in trust for the plaintiff on

the defendant's being appointed to the office of collector of the customs at the port of *Carlisle*, and the ports and places thereto appertaining on the plaintiff's application to the Lords of the Treasury for that purpose, and had promised to appoint such a deputy as the plaintiff should nominate, and also to empower the plaintiff to receive the profits of the office, the case was within the stat. 5 & 6 *Ed. 6.*, and that no action on the agreement could be supported at law.—This appointment of Mr. *Fearon* afterwards gave rise to two actions in the Court of King's Bench, *Fearon v. Pearson*, and *Fearon v. Potter*, in both of which the plaintiff failed.—See also *Blachford v. Preston*, 8 *D. & E.* 89.

WINSMORE against GREENBANK.

M. 19 G. 2.
Saturday,
Oct. 26th.

"SKINNER, Willes, and Hayward Serjts. moved for a new trial upon several affidavits, setting forth (as they were opened) that the verdict was against evidence, and the damages excessive (a), being 3000*l.*

Verdict not
set aside for
excessive
damages, in
action for en-
ticing away
the plain-
tiff's wife.

—In such action the declarations of the wife not admissible in evidence.
—In an action on the case for inducing the plaintiff's wife to continue absent it is sufficient to state that "the defendant unlawfully and unjustly persuaded, procured and enticed the wife to continue absent &c, by means of which persuasion &c she did continue absent &c; whereby the plaintiff lost the comfort and society of his wife;" without setting forth the means &c used by the defendant.

(a) See *Duberley v. Gunning*, 4 *D. & E.* 651. and the cases there referred to, as to the kind of actions in which the Courts will interfere by granting new trials on the ground of excessive damages. In the case of *Duberley v. Gunning*, which was an action for criminal conversation, the Court of King's Bench thought they could not grant a new trial, although the damages (5000*l.*) were admitted to be larger than under all the circumstances

of the case ought to have been given. But in a subsequent case, *Jones v. Sparrow*, 5 *D. & E.* 257., where in resisting an application for a new trial on the ground of excessive damages in an action for an assault and battery the plaintiff's counsel relied on *Duberley v. Gunning*, the Court said that was a case *suū generis*, and the damages appearing to be excessive they granted a new trial.

1745.

WINSMORE
against
GREEN-
BANK.

The action was an action on the case for enticing away and detaining the plaintiff's wife, which were laid in the declaration with several other particular circumstances: but my Brother *Abney* who tried the cause being in court, and certifying that the verdict was not against evidence, nor the damages excessive, and that he was not dissatisfied with it, we would not make any rule, nor did we suffer the affidavits to be read.

Hayward likewise mentioned another objection; that the Judge would not allow the declarations of the wife to be given in evidence on either side: but the two senior counsel would not insist on that objection, and

My Brother *Burnett* and I were of opinion that my Brother *Abney* did right in refusing to admit such evidence."

—"They then moved in arrest of judgment."

—In order to understand the grounds of the motion in arrest of judgment, it is necessary to state some parts of the record.

The declaration contained four counts. The first stated that on the 1st of *January* 1741 *Mary* then and until the 24th of *December* 1742 being the wife of the plaintiff (but since deceased) unlawfully and without his leave and against his consent departed and went away from him &c, and lived and continued absent and apart from him from thence until and upon the 8th of *August* 1742, and during the said time that the said *Mary* so lived and continued absent a large estate both real and personal to the value of 30,000*l.* was devised to her by *W. Worth* D. D. her late father for her sole and separate use and at her sole and separate disposal; that thereupon she was desirous of being and intended to be again reconciled to the plaintiff and to live and cohabit with him, whereby he would have had and received the benefit and advantage of the said real and personal estate (the plaintiff being willing and desirous to be reconciled &c,) yet the defendant knowing the said premises and having notice of the said *Mary's* intention, but contriving to injure the plaintiff, and to prevent *Mary* the wife from being reconciled to him &c and to prevent the plaintiff receiving any advantage

advantage from the said real and personal estate &c, on the 8th of *August* 1742 unlawfully and unjustly persuaded procured and enticed the said *Mary* to continue absent and apart from the plaintiff and to secrete hide and conceal herself from the plaintiff, by means of which persuasion procuration and enticement the said *Mary* from the said 8th of *August* 1742 until the time of her death on the 24th of *December* 1742 continued absent and apart and secreted herself &c; whereby the plaintiff during all that time totally lost the comfort and society of his said wife and her aid and assistance in his domestic affairs and the profit and advantage that he would and ought to have had of and from the said real and personal estates &c, and was put to great charges and expences in endeavouring to find out and gain access to his said wife in order to persuade and procure her to be reconciled to him.

1745.
WINSMORE
against
GREEN
BANK.

The second count stated that on the 7th of *August* 1742 Dr. *Worth* died, on whose death the plaintiff's wife became seized and possessed of real and personal estates to the value of 30,000*l.* to her sole and separate use and at her sole and separate disposal, yet the defendant maliciously and wickedly intending to injure the plaintiff, and to deprive him of the aid assistance and comfort of his wife, and to raise foment and continue discords and quarrels between the plaintiff and his wife, and to alienate the affections of the wife from the plaintiff, and to deprive the plaintiff from having or receiving any advantage or benefit from the said estates &c, on the 8th of *August* 1742 unlawfully and unjustly persuaded procured and enticed the said wife to depart and absent herself from the plaintiff and to secrete herself from him, by means of which persuasion procuration and enticement the said *Mary* on the said 8th of *August* departed and absented herself from the plaintiff without the plaintiff's consent and continued absent until her death &c; whereby the plaintiff &c (as in the first count.)

The third count stated that on the 8th of *August* 1742 the plaintiff's wife without and against his consent went away from him, and went to the defendant, yet the defendant, well knowing the said *Mary* to be the wife of the plaintiff, received her,

1745.
 WINSMORE
 against
 GREEN-
 BANK.

and concealed her from the plaintiff, and kept her so concealed from him until the time of her death, and wholly refused to deliver her to the plaintiff or to discover her place of residence, (although on &c at &c he was requested &c,) but unlawfully entertained harboured concealed and secreted her from the plaintiff from the 8th of *August* 1742 until the time of her death; whereby the plaintiff &c (as before, only omitting that the plaintiff was deprived of the benefit of the fortune &c.)

The fourth count stated that the defendant harboured and concealed the plaintiff's wife until her death, and also caused her to be buried secretly, and kept her death a secret from the plaintiff for a year after her death &c, whereby the plaintiff lost the comfort and society of his wife from the said 8th of *August* until the time of her death, and the benefit of her fortune &c.

The defendant pleaded not guilty; and the jury found a verdict for the plaintiff on the three first counts, and gave 3000*l.* damages, and a verdict for the defendant on the last.

This case was argued on the 18th and 26th of *November* 1745, and the 29th of *January* following, by *Skinner* and *Willes* King's Serjeants and *Draper* and *Hayward* Serjeants for the defendant, in support of the motion in arrest of judgment, and by *Prime* and *Birch* King's Serjeants and *Bootle* Serjeant for the plaintiff; and on the 1st of *February* following the rule to arrest the judgment was discharged.

Willes, Lord Chief Justice delivered his opinion to the following effect:

Several objections have been taken by the defendant to this declaration in arrest of judgment; two general ones, and three to the particular penning of the declaration. I admit the rules laid down in most of the cases that were cited, and therefore shall have occasion to mention only a few of them, because they are not applicable to the present case.

The first general objection is, that there is no precedent of any such action as this, and that therefore it will not lie; and the

the objection is founded on *Lit. f.* 108. and *Co. Lit.* 81. b., and several other books. But this general rule is not applicable to the present case; it would be if there had been *no special action on the case* before. A special action on the case was introduced for this reason, that the law will never suffer an injury and a damage without a remedy: but there must be *new facts* in every special action on the case (a).

1745.
WINSMORE
against
GREEN-
BANK.

The second general objection is, that there must be *damnum cum injuriâ*; which I admit. I admit likewise the consequence, that the fact laid before *per quod consortium amisit* is as much the gist of the action as the other; for though it should be laid that the plaintiff lost the comfort and assistance of his wife, yet if the fact that is laid by which he lost it be a lawful act, no action can be maintained. By *injuria* is meant a *tortious* act: it need not be *wilful and malicious*; for though it be accidental, if it be tortious, an action will lie.

This rule therefore being admitted, the only question is whether any such injury be laid here; and this rule will properly come to be considered under the several objections made to the particular counts; for if any of them hold, then no injury is laid. I admit also that as the verdict is on the three counts and the damages are entire, if either of the counts be bad, the judgment must be arrested. To the second count no objection was taken.

But the counsel for the defendant began with the third count, to which they took several objections, which are all false in fact.

(a) Vid. *Abbey v. White*, 2 *Ld. Raymond* 957; *Pasley v. Freeman*, 2 *D. & E.* 51; and *Chapman v. Pickersgill*, 2 *Will.* 146, in which last case, which was an action on the case for falsely and maliciously suing out a commission of bankrupt against the plaintiff, Lord Chief Justice Pratt (in answer to the objection of novelty) said "but it is said this action was never brought; and so it was

said in *Abbey v. White*: I wish never to hear this objection again. This action is for a tort; torts are infinitely various, not limited or confined; for there is nothing in nature but may be an instrument of mischief; and this of suing out a commission of bankrupt falsely and maliciously is of the most injurious consequence in a trading country."

1745.
 WINSMORE
 against
 GREEN-
 BANK.

1st, That it is not laid that the wife went away without the husband's consent; but it is expressly so laid.

2dly, That it is not laid that the defendant knew of it; but it is laid in express terms that he did, and that knowing it he concealed and detained her.

3dly, That no request by the plaintiff to the defendant to deliver up the wife and refusal by the defendant are laid. It is not necessary to determine in this case whether a request and refusal were necessary, because both are expressly laid here: but, according to my present thoughts, in the case of a *detainer* I think them necessary. And as not guilty to the whole is pleaded in special actions on the case, it puts every fact that is laid in issue, I think it likewise necessary to prove the request and refusal, and we must take it that this was so proved at the trial, the jury having found a verdict for the plaintiff.

The principal objections were to the first count, and they were three;

1st, That *procuring, enticing, and persuading*, are not sufficient, if no ill consequence follows from it;

2dly, That *unlawfully and unjustly* will not help the case; but the particular methods made use of should have been stated by which the defendant procured &c, otherwise this is leaving the law to a jury;

3dly, That no notice or request is laid, which is necessary in the case of the continuance, though it be not necessary if the defendant had at first persuaded her.

To the first there were two answers;

1st, That here is a consequence laid, that by means thereof the plaintiff lost the comfort and society of his wife, and the profit and advantage of her fortune &c;

2dly, Whe-

2dly, Whether "enticing" goes so far or not I will not nor need determine, because "procuring" is certainly "persuading with effect." I need not cite any authorities for this; because every one who understands the *English* language knows that this is the common acceptation of that word.

1745.
WINSMORE
against
GREEN-
BANK.

2dly, But, to be sure, it must be *an unlawful procuring*, and that brings me to the second objection. It is not necessary to set forth all the facts to shew how it was unlawful (a); that would make the pleadings intolerable, and would increase the length and expence unnecessarily. It was said however that at least it was necessary for the plaintiff to add "by false insinuations:" but it is not material whether they were true or false; if the insinuations were true and by means of those the defendant persuaded the plaintiff's wife to do an unlawful act, it was unlawful in the defendant.

In answer to the objection that this is leaving the law to the jury, it must be left to them in a variety of instances where the issue is complicated, as, burglariter, felonice, proditorie, devifavit vel non, demisit vel non. But the Judge presides at the trial for the very purpose of explaining the law to the jury, and not to sum up the evidence to them.

As to the distinction between the beginning and continuance of a nuisance by building a house that hangs over or damages the house of his neighbour, that against the beginner an action may be brought without laying a request to remove the nuisance, but that against the continuer a request is necessary, for which *Penruddock's case*, 5 Co. 100, 101, was cited, and many others might have been quoted, the law is certainly so, and the rea-

(a) This is not required even in some indictments. In *R. v. Eccles and others*, M. 24 Geo. 3. B. R. the defendants, who had been found guilty of a conspiracy, moved in arrest of judgment, because the indictment merely stated that they had conspired together by *indirect means* to prevent one H. B. exercising the trade of a taylor, without setting forth the means used: but the Court over-ruled

the objection, saying that it was sufficient to state the conspiracy and its object. So in an indictment on stat. 37 Geo. 3. c. 70. it is sufficient to charge the defendant with *having endeavoured* to seduce persons serving in his Majesty's forces by sea or land from their allegiance and to incite them to mutiny, without setting forth the means employed, *R. v. Fuller*, Bos. & Pull. 180.

1745.

WINSMORE
against
GREEN-
BANK.

son of it is obvious. But that reason does not extend to the present case; because every moment that a wife continues absent from her husband without his consent, it is a new tort, and every one who persuades her to do so does a new injury and cannot but know it to be so.

Several arguments were urged and several cases were cited on both sides on the question, whether defects in this declaration were or were not aided by the verdict: but I shall not take notice of them, because I am of opinion that there are no defects to be cured, and that the declaration would have been good even on a demurrer. Had the words "unlawfully and unjustly" been omitted, this question might have been material, because it is lawful in some instances for the wife to leave the husband: but as the declaration is framed, it is not necessary to enter into the consideration of that question. Many observations were likewise made on the quantum of the damages given by the jury, and it was said that it was uncertain whether or not the husband had sustained any: those were proper observations on the motion for a new trial (which has been already disposed of) but cannot have any weight on this motion in arrest of judgment, where every thing laid in the declaration must be taken to have been proved. I can see no reason to arrest this judgment, and therefore I am of opinion that the rule must be discharged.

Mr. J. *Abney*, and Mr. J. *Burnett*, gave their opinions *seriatim*, agreeing with the Lord Chief Justice.

Rule discharged.

EDWARD DYKE and JOHN WEBBER Administrators
of GREGORY GARDINER against JOSEPH SWEET-
ING, Son and Heir of JOSEPH SWEETING his
Father deceased.

1745.

M. 19 G. 2.
Friday.
Nov. 8th.

"COVENANT. The plaintiff declares on an indenture of demise, dated the 22d of November 1727, whereby *Joseph Sweeting* deceased demised to the said *Gregory Gardiner* several premises therein mentioned, being leasehold, to hold to the said *Gregory* during the rest and residue of the said *Joseph's* estate, redeemable on payment of 280*l.* and interest by the said *Joseph* his heirs executors or administrators at the end of six months next after the date of the said indenture. And the said *Joseph* the father covenanted for himself his heirs executors administrators and assigns that the said principal sum of 280*l.* with it's full interest should be paid according to the purport true intent and meaning of the said indenture.

The breach assigned was that the said *Joseph Sweeting* the father in his lifetime did not pay to the said *Gregory* in his lifetime nor to the plaintiffs or either of them after the death of the said *Gregory* the said sum of 280*l.* with interest for the same or any part thereof at the end of six months next after the making of the said indenture, nor at any other time whatsoever, nor has the defendant since the death of his said father paid the same or any part thereof to them or either of them, but the said sum of 280*l.* and the interest thereof from the time of the making of the said indenture hitherto are still wholly due, owing, and unpaid; damage 600*l.* &c.

The defendant pleads that the said *Joseph* the father in his lifetime, on the 10th day of May 1728, paid to the said *Gregory* in his lifetime the sum of 280*l.* with all interest due to the same according to the form and effect of the condition in the said indenture.

The plaintiffs reply; and protesting that the said plea of the said defendant is insufficient in law, they for replication say

7 K

that

An action of covenant will lie against the heir on a covenant by which the ancestor bound himself and his heirs. In such an action it is not necessary to allege in the declaration that the heir had lands by descent: if he had none, he must plead it. To an action on a covenant to pay money on a particular day, the defendant cannot plead payment on a prior day, because if found one way it is not conclusive; but he must plead payment on the day. On a covenant to pay money at the end of six months, it will be understood to mean calendar (not lunar) months. Semb.

1754.

DYKE
against
SWEETING.

that the said *Joseph Sweeting* the father survived by the space of six months and more next after the date of the said indenture; and that the said *Joseph Sweeting* the father within or at the end of six months next after the date of the said indenture did not satisfy or pay or cause to be paid unto the said *Gregory Gardiner* his executors or administrators the said sum of 280 l. with the interest due for the same, according to the effect of the covenant aforesaid; and this they are ready to verify.

To this replication the defendant demurs; and for causes shews that the plaintiffs by their replication have not demurred to the plea of the defendant, nor taken issue thereupon, nor in any manner confessed or avoided traversed or denied the same; and for that the said plaintiffs by their replication have alleged new matter not alleged in their declaration, to wit, that the said *Joseph Sweeting* the father survived by the space of six months or more next after the date of the said indenture, which matter tends to drive the defendant into a departure in pleading; and the said replication is double &c.

The plaintiffs join in demurrer.

Gapper Serjt., for the defendant, objected to the replication, that the plaintiffs ought to have taken an objection to the defendant's plea, and not to have replied new matter. And afterwards in his reply he took two other objections, that the declaration does not say that the heir had lands, and that an action of covenant will not lie against the heir, but only an action of debt.

Belfield Serjt. for the plaintiffs insisted that the plea was a bad plea, and that if the plaintiffs had joined issue upon it they would have been tricked; for if a verdict had been for the plaintiffs, they could not have had judgment upon it, as being an immaterial plea when found that way, as has been determined several times upon this plain reason, that though the money might not have been paid *before*, it might have been paid

paid at, the day (a), which would be sufficient to bar the plaintiffs of their action. And he said that when a man covenanted for himself, an action of covenant would lie against the heir, as well as an action of debt where a man bound himself and his heirs, otherwise the word "heirs" would be a nugatory word; and he said that in an action of debt against an heir (b), it is never alleged in the declaration that the heir hath lands by descent; but if he hath none, he may insist upon it by way of defence.

1745.
Dyke
against
SWEETING.

And I, and my Brothers Abney and Burnett, were of opinion with Belfield in omnibus; so gave judgment for the plaintiffs (c).

Gapper Serjt. cited *Baskerville v. Brockett*, Cro. Jac. 450, and Sir Wm. Herbert's case, 3 Co. 12. But upon looking into those cases, they are nothing at all to the purpose. He likewise insisted that the months should be taken to be legal months of 28 days each, and not calendar months, and that reckoning but 28 days to a month the sixth months just expired on the 10th of May, and so the payment pleaded was upon the day in

(a) *Holmes v. Brocket*, Cro. Jac. 435. But if the condition be to pay money on or before such a day, and the defendant plead payment before that day, and the plaintiff reply that it was not paid on that day, on which issue is taken and found for the plaintiff, the plaintiff cannot have judgment, because payment might have been made before that day. *Tryon v. Carter*, M. 8 Geo. 2. 2 Str. 994 (1); and *Bull. N. P.* 162. In *Fletcher v. Kennington*, 2 Burr. 944, and 1 Bl. Rep. 210, and also in an anonymous case in 2 Will. 173, it was holden that the plaintiff cannot demur to such a plea; for by demurring, he admits the truth of it, namely, payment before the day, which is expressly a payment according to the

condition; and that if he dispute the reality of any payment at all he should reply that the money was not paid on that day or at any time before &c; or he may reply that the defendant did not pay according to the form and effect of the said condition. *Bull. N. P.* 174; and 2 *Ld. Raymond* 1370.

(b) *Vid. Gott v. Atkinson*, Hil. 18 G. 2. sup. 521.

(c) A writ of error was afterwards brought in the court of King's Bench, where the only objection taken by the plaintiff in error was the want of an original; (*vid. 1 Will.* 181;) thereby tacitly acknowledging the propriety of this judgment in other points.

(1) Though not stated in either of the printed reports of this case, it came before the Court of King's Bench on a writ of error from the Common Pleas, the judgment of which last Court in favor of the plaintiff was reversed and a repleader awarded. MS. *Call. Will.* Ch. J.

1745.

DEBT
WRIT
SWEETING.

the condition. But in the first place this was false in fact, for reckoning but twenty-eight days to a month the six months expired on the 8th of May, and so the payment pleaded was after the day. Besides we thought (but came to no opinion upon this) that the months were to be calendar months. We had therefore no regard at all to this argument."

M. 19 Geo. 2.
Thursday,
Nov. 14th.

A person who
buys and sells
cattle is a dro-
ver, and can-
not be a bank-
rupt.

Bull. N. P.
39. S. C.

MILLS against HUGHES and Another.

"IT came before the Court upon a case made before Mr. Baron Reynolds at the last Lent assizes held for the county of Gloucester.

The case was thus; the plaintiff claimed under an execution by fieri facias against the goods of *Richard Liffully*. The defendants justified under a commission of bankrupt awarded against the said *Liffully*, as assignees under the said commission. There was no doubt whether *Liffully* absconded, but the only question was whether he were such a trader as could be a bankrupt. The evidence was that for about five years before the issuing of the said commission he had used and exercised a trade in buying and selling cows and calves. That during the same time he was possessed of a farm of the yearly value of 35 £, on which he constantly kept a stock of milking cattle equal to a farm of that value. Besides which he trafficked during the said time in such cows and calves as aforesaid, which were bought to be sold again in a course of merchandize and not for the use of his farm, nor were they ever brought thither, but sometimes sold in the same markets wherein they were bought or otherwise as soon as the said *Liffully* could find chapmen to buy the same. It appeared likewise that the said *Liffully* was not possessed of any other land save as aforesaid, but if he were obliged for want of immediate purchasers to keep such cattle for a few days, he then agisted them in the grounds of other persons until he could conveniently sell the same.

Verdict for the plaintiff, subject to the opinion of the Court of Common Pleas on the following question, whether the said

Liffully by dealing in buying and selling cattle as aforesaid was a person capable of being a bankrupt within any of the statutes relating to bankrupts.

1745.
MILLS
against
HUGHES.

In order to prevent delay we permitted the case to be spoken to twice this term, first by Serjt. *Skinner* for the plaintiff, and Serjt. *Prime* for the defendants, and then by Serjt. *Willes* for the plaintiff and Serjt. *Wynne* for the defendants.

The only question was whether *Liffully*, as described in the case, were a drover or not; because if he were, he was expressly excepted, and could not be a bankrupt by the 5 Geo. 2. c. 30. s. 40. the words of which are exactly the same to this purpose as the 5 Geo. 1. c. 24. s. 28, which is expired: but the stat. 5 Geo. 2 was continued (a) by the 9 Geo. 2. till 1743, and again by the stat. 16 Geo. 2. until *Michaelmas* 1750. The words of the statute on which this question arises are, "Provided always and it is hereby further declared and enacted, that no farmer, grazier, or drover of cattle, or any person who is or shall be receiver-general of the taxes granted by act of parliament, shall be entitled as such to any of the benefits given by this act, or be deemed a bankrupt within the same, or within any of the statutes now in force concerning bankrupts."

My Brother *Abney* and I first doubted whether *Liffully*, as described in the case, was a drover within the meaning of the act, considering a drover to be one who drove cattle for other persons, or at most only a factor who bought or sold them for other persons and not for himself; and that therefore it was put in this clause in the statute by way of exception out of the foregoing clause, it being there declared that a factor might be a bankrupt.

But my Brother *Burnett* upon the first argument was of a different opinion, and thought that the word "drover" ought to be taken in a more extensive sense, and that it not only signified a drover or factor of cattle, but likewise one who bought cattle for himself at one market or fair and sold them at another.

(a) Made perpetual by stat. 27 Geo. 2. c. 16.

1745.

MILLS
against
HUGHES.

And upon the second argument I and my Brother Abney came into my Brother Burnett's opinion for the following reasons;

1st, Because a *drover* is joined in the clause in the statute with a *farmer* and *grazier*, which implies that the statute meant a person of the same sort.

2dly, In *Jacob's Law Dictionary*, third edition, *drovers* are said to be those who buy cattle in one place to sell in another; and *drover* seems to be derived from the word "drove," and not from the word "drive."

3dly, It is plainly made use of in this sense in the statute 5 & 6 *Ed. 6. c. 14.* and 5 *Eliz. c. 12.* The first is entitled an act against regraters, forestallers, and engrossers; and in sect. 16, are these words, "provided also, and be it enacted by the authority aforesaid, that it shall and may be lawful for every person and persons known for a common drover or drovers being licensed (as therein is mentioned) to buy cattle in such shires or counties where drovers have been used to buy cattle, and to sell the same at reasonable prices in common fairs and markets distant from the place where he or they shall buy the same forty miles at least." The latter statute is intitled "An act touching badgers of corn and drovers of cattle;" and in sect. 2, 3, 4, 5, and 6, it recites the clause in the 5 & 6 *Ed. 6.* concerning drovers, and gives further directions concerning licensing and regulating drovers of cattle; and there the word "drovers" is plainly understood in the sense now contended for by the plaintiff.

4thly, There are several cases, and one directly in point, which warrant this construction. There are several before the statute 5 *Geo. 1.*; but I will only mention one, the case of *Collis v. Malin*, reported in *Cro. Car.* 282., and Sir *W. Jones* 304, but best in the latter. It was an action for words, wherein the plaintiff declared that per magnum tempus usus fuit the trade or business of a *drover*, and that the defendant said "thou art a bankrupt;" verdict for the plaintiff, and moved in arrest of judgment; 1st, That it was not laid that the plaintiff used the trade at the time of speaking the words. 2dly, That a drover is not within the statutes then in force concerning bankrupts. But the Court, as to the second objection, held that he was (a), so plainly considered him as a buyer and seller of cattle. *Croke*

(a) At that time *drovers* were not excepted out of the bankrupt laws.

indeed

Jacob's Law Dictionary is a book I should have expected to have been cited by the court as an authority.

indeed states the declaration differently, that the plaintiff declared that he had used the trade of buying and selling cattle, and divers times bought upon credit: but he is certainly mistaken; for if so the question never could have arisen whether the plaintiff were within the statutes of bankrupts: but it shews that *Croke* thought that *drover* ex vi termini meant a buyer and seller of cattle. The case in point was an anonymous case determined in this court Hil. 10 Geo. 1. on the stat. 5 Geo. 1. c. 24. s. 28, which was thus. An issue was directed out of Chancery to try whether *A.* were a bankrupt within the meaning of that statute. The question at the trial was whether *A.* were a *drover*. The witnesses at the trial proved that three descriptions of persons are concerned in this sort of business. 1st, The person who buys the beasts in the country, and for whose account they are afterwards sold; and him they called the *jobber* or *dealer*; and it appeared that *A.* was of this description. 2dly, The person who actually drives the beasts to market, and who is usually a servant of the jobber; and him (*a*) they called the *drover*. 3dly, The person who sells the beasts at *Smithfield* for the jobber; and him the witnesses called the *salesman*. But the jury (*b*) were of opinion that the first person above mentioned, called the *jobber* or *dealer*, was the *drover* intended by the act. Serjt. *Selby* moved for a new trial, because the verdict was contrary to evidence; but the Court denied the motion, for none could be a bankrupt but one who sought his living by buying and selling, and that before the late statutes where drovers are excepted it was holden that drovers might be bankrupts; and for this purpose was cited the before-mentioned case of *Collis v. Malin*. And they said that a *drover* was not the *driver*, but one who bought and sold, as appeared from the statutes before mentioned, 5 & 6 Ed. 6, and 5 Eliz. c. 12. That, it being found inconvenient that such drovers should be bankrupts, to prevent this inconvenience the exception was inserted in the statute 5 Geo. 1., which must

(a) It would be a strange construction of the act to say that this second description of persons was that which the Legislature meant to except. A person excepted out of a statute must be some person who, without such exception, would be included in it: but a mere driver of the cattle of other persons, who neither buys or sells

them, is not within any of the bankrupt laws; the Legislature therefore, when they excepted *drovers*, must have had in their contemplation something more than *drivers*.

(b) Under the direction of the learned Judge who tried the cause (it is presumed) it being a question of law.

mean

1745.

MILLS
against
HUGHES.

1745.
MILLS
against
HUGHES.

mean the same person by the word "drover" as was before holden to be within the statutes relating to bankrupts.

Wynne Serjt. cited two or three dictionaries to shew that the word "drover" only signified a *driver* of cattle: but they being of very little authority, we did not at all regard them; but

Ordered that the verdict should stand, and that judgment should be for the plaintiff.

N. The words of the statute are that no farmer, grazier, or drover, *as such*, can be a bankrupt; and therefore my Brother Abney very rightly observed that each of these might be a bankrupt if he dealt in buying and selling any other commodities; and that it had been frequently determined so in the King's Bench, particularly in the case of *Mayo and Archer* (a) *M. 8 Geo. 1.* that a farmer might be a bankrupt if he bought a great quantity (b) of hay and sold it again."

(a) 8 *Mod.* 46; and 1 *Str.* 513.

(b) The rule established in later cases is that the extent of the trading is not so material as the intention of the trader, namely, whether with a view to profit he buy and sell again to any person who ap-

plies to him for the commodity in which he deals; of which intention the jury are to judge. *Palman v. Vaughan*, 1 D. & E. 572; and *Bartholomew v. Sherwood*; *ib.* 573.

M. 19 Geo. 2.
Thursday,
Nov. 21st.

GOODTITLE on the Demise of JOSHUA and THOMAS CROSS against WODHULL and Others.

[Hil. 16 Geo. 2. Rol. 870.]

Devise to
"A. for life,
and then to
his male chil-
dren for their
lives, and so
to the male
children de-
scending from
them; on their decease or failure then to B. and the heirs male of his body for the same term of life and upon the same terms as the deviser intended for A. and his male children; and in case of B. and his male children failing, then to C. and his male children for the same term of his and their life and upon the same terms."

—Held that A. took an estate for life only; and that on his death without male issue B. took an estate for life only.

THIS ejectment was brought to recover the manor of *Broadlands* and certain other lands in *Lincolnshire*. Three demises were laid in the declaration, one of an undivided moiety by *Joshua Cross*, another of the other undivided moiety by *Thomas Cross*, and the third of the whole by *Joshua and Thomas*;

and

and on the trial a special verdict was found, containing these facts.

1745.

GOODTITLE
dem. CROSS
against
WODHULL.

On the 4th of *April* 1674 *Joshua Cross*, LL. D., being seised in fee of the premises in question, by will devised them as follows; "My will is that my eldest son *Joshua*, when he is complete 24 years old, shall have my manor &c; and my will is that my said son shall have and enjoy the said manor &c only *for his life*, and then the premises shall descend and come to *his male children* (if he have any) *for their natural lives only*, and to the male children descending from them; and upon their decease or failure, then my will is that the premised estate in manor &c shall descend and fall to *my son Latimer Cross and the heirs male of his body* for the same term of life and upon the same terms as I intended the same for my son *Joshua* and his male children; and in case of his (*Latimer's*) and his male children their failure, then the said manor &c shall descend to *my son Thomas Cross and his male children* for the same term of his and their life and upon the same terms: but if my said sons have daughters only, and the said premised estates descend thereupon to *Latimer or Thomas*, then my will is that the said manor &c shall descend to and be equally divided between the daughters of *Latimer* and *Thomas* as to one moiety, and the daughter or daughters of *Joshua* as to the other moiety: but if they or any of them have no issue male or female then what was intended for or descended to the daughter or daughters of all or any of them shall descend not to their cousins but my daughter *Rachael* and her lawful children: but upon the failure of my said four children and their lawful issue, then my will is that my nephew *J. Garlanland* and his children shall have to him and them and the lawful heirs of their bodies for ever my manor &c.—And my will further is that in case what estate was intended to my son *Joshua* fall to *Latimer*, then what was intended for *Latimer* shall come to *Thomas*, and upon *Thomas* and his children; and my will also is that my estate in the manor &c shall not be enjoyed by any of my said sons until they shall accomplish the age of 25 years, unless my wife and trustees think fit they should sooner enter&c &c."

The deviser died on the 1st of *October* 1676, leaving three sons, *Joshua*, *Latimer*, and *Thomas*. Soon after the father's

1745.
 GOODTITLE
 dem. CROSS
 against
 WOODHULL.

death *Joshua* entered; in *Hilary* term 1695 he suffered a recovery, the uses of which were declared to himself in fee; and on the 4th of *May* 1709 he died, never having had a son, leaving three daughters, *Rachael* the wife of *J. Sanby* clerk, *Ann* the wife of *James Markbam*, and *Elizabeth Cross*. On his death his three daughters and the husbands of the two eldest and *Latimer Cross* the second son of the devisor *Dr. Cross* respectively entered, the former claiming as heirs of *Joshua Cross* the eldest son of the devisor, the latter under the will of 1674; and afterwards in *M. 9 Geo. 1.* they all joined in levying a fine and suffering a recovery, and declared the uses to *J. Markbam* in fee, under whom the defendants claim. *Latimer Cross* afterwards on the 10th of *August* 1739 died, never having had any children. *Thomas Cross*, the third son of the devisor *Dr. Cross*, died on the 10th of *January* 1708, in the lifetime of his brother *Joshua* and after the recovery suffered by him, leaving two sons *Joshua* and *Thomas Cross*, the lessors of the plaintiff, who within five years after the death of *Latimer*, H. on the 8th of *December* 1742, made an actual entry on the premises in question.

The case was twice argued, the first time by *Boyle* Serjt. for the plaintiff on the 31st of *January* 1744, 5, and by *Belfield* Serjt. for the defendants on the 27th of *June* 1745, and the second time by *Draper* Serjt. for the former and *Willes* King's Serjt. for the latter on the 21st of *November* 1745; and the two principal questions were, 1st, what estate *Joshua Cross*, the son of the devisor, took, whether for life or in tail; 2dly, what estate *Latimer Cross* took, whether for life or in tail; and the Court took time to consider of these questions. Another question was also raised at the bar, namely, whether or not the recovery suffered by *Joshua* (on the supposition that he was tenant in tail) were well suffered, it not being stated in the special verdict that he was of the age of 24 when the recovery was suffered, but that was disposed of in the course of the argument.

The opinion of the Court was afterwards delivered by

Willes, Lord Chief Justice (after stating the case). "The last question was disposed of in the course of the argument.

As

As to the other two points, I shall be very short in giving our opinion, both because I think they are very plain points, and because all the doctrine relating to this matter was fully explained and all the cases thoroughly considered by the Court in a late case of *Ginger v. White*, in Trinity term 1742 (a).

1745.
GOOD TITLE
dem. CROSS
against
WOBURN.

First; We are of opinion that *Joshua Cross*, the son of the devisor, took only an estate for life; for which I shall cite only three or four cases, none of which are so strong to warrant this construction as the present. *Archer's case*, 1 Co. 66; a devise to *Robert Archer* for life, and to his next heir male and the heirs male of the body of such heir male; and it was holden to be only an estate for life. The case of *Clerk v. Day*, Cro. Eliz. 313. was exactly the same. Then in *Wild's case*, 6 Co. 17. where it was held that if there be a devise to *A.* and his children, and there be no children, it is an estate-tail of necessity, because it is a devise to the children by words de presenti: but a devise to *A.* and after his decease to his children, it is only an estate for life. Again in *Lodington v. Kime*, Salk. 224, there was a devise to *A.* for life without impeachment of waste, and in case he have any issue male then to such issue male and his heirs for ever; and it was held that issue must be taken as *nomen singulare*, because of the devise to the heirs of such issue. So in *Rol. Abr. (b)*, a devise to his eldest son for life et non aliter, and after his decease to the sons of his body; it was holden to be only an estate for life, by reason of the words non aliter. And lastly in the case of *Ginger v. White* (which his Lordship here read from his own note, *ut sup.* 348). The case of *Langley v. Baldwin*, 1 Eq. Caf. Abr. 185. is like no other case, and therefore it is no authority (c). With regard to the objections as to the absurdities that will follow; it is not to be supposed that the devisor knew them: but it is plain that he had it in his contemplation whether they should have estates for life or in tail.

As to the second point, what estate *Latimer Cross* took; the reason of the thing points out that he should only have an estate

(a) *Ginger d. White v. White*, *sup.* 348.

(b) 1 *Rol. Abr.* 837. pl. 13. This case is not so stated in *Rol. Abr.*: but Lord Hale thus cited it in 1 *Ventr.* 231, and

said that Rolle's account of it was inaccurate.

(c) See the observations on this case in *Ginger v. White*, *sup.* 358.

for

1745.
 GOODTITER
 dem. CROSS
 against
 WOODHULL.

for life. Besides the old rules in *Co. Lit.* (a) and 1 *Rol.* 838 and 839, that where a man gives an estate to one and his heirs or the heirs of his body, and another estate to another in formâ prædictâ, or remainder to another in formâ prædictâ, he shall have the same estate. The case of *Lowe v. Davies*, M. 3 Geo. 2. B. R. in 2 *Lord Raym.* 1561. (b), is also in point: that was a devise to *Benjamin Jevon* and his heirs lawfully begotten, that is to say, his first, second, third, and every son and sons successively lawfully to be begotten and the heirs of their bodies &c; and it was holden an estate for life.

The attempt to explain the first clause in this will by the second, and to consider it as turning the first estate into an estate-tail, was a very ingenious attempt, and the best argument that could be used: but it is plainly without any foundation; for the words of the second clause are "to *Latimer* and the heirs male of his body, for the same term of life and upon the same terms as I intended the same for *Joshua* and his male children:" but those terms were "to *Joshua* for life and to his male children for their natural lives only, and so to the male children descending from them." If the deviser had known the sense of the words "heirs male," and had intended an estate-tail by it, he certainly would have inserted them in the first clause. Besides, the words in the other devise, to *Thomas*, plainly exclude any such supposition.

We are therefore of opinion that the judgment may be entered up generally for the plaintiff on all the demises in the declaration."

(a) *Co. Lit.* 20. b.

(b) 2 *Str.* 849; *Fitzg.* 112. S. C.

1745, 6.

WM. MYDDELTON *against* Sir WATKIN WILLIAMS
WYNN, Bart.; in Error.

H. 19 Geo. 2.
Tuesday,
Feb. 11th.
Exchequer-
Chamber.

[Hil. 16 Geo. 2. Rol. 868.]

THIS was an action on the case, brought on the stat. 7 and 8 W. 3. c. 7. in the Court of King's Bench against the defendant below (the plaintiff in error) sheriff of the county of *Denbigh* for a false return of a member of parliament for that county. The declaration, after setting forth the issuing of the writ and the delivery of it to the defendant below, stated that at the election the plaintiff below (Sir *W. W. Wynn*) and *John Myddelton* were candidates, and that the former was duly elected, yet that the defendant wilfully maliciously and injuriously intending to injure and oppress the defendant and to hinder him from his place in parliament did not declare him to be elected but voluntarily maliciously and injuriously neglected and refused so to do, and after the said election wilfully falsely maliciously and injuriously contrary to the duty of his office and contrary to the form of the statute &c returned *J. Myddelton*; whereas in truth *J. Myddelton* was not elected but the plaintiff below was duly elected; and whereas *J. Myddelton* ought not, but the plaintiff below ought, to have been returned. The plaintiff then averred that after the said return several petitions of several freeholders of the county, and also a petition of the plaintiff (Sir *W. W. Wynn*), were presented to the House of Commons, severally complaining of an undue election and return; that the House, having proceeded thereupon, resolved that Sir *W. W. Wynn* ought to have been returned, and ordered the clerk of the crown to amend the return by striking out *J. Myddelton*'s name and inserting in its stead that of Sir *W. W. Wynn*, which amendment was accordingly made; that the House also ordered that the further hearing of the matter of the several petitions should be discharged, and that *J. Myddelton* should be at liberty to petition the said House touching the election within fourteen days then next if he should think fit, but that *J. Myddelton* did not within that time petition the House touching the election; by reason of which premises Sir *W. W. Wynn* was prevented taking his seat in parliament for seven months, and was put to great expence &c.

The stat. 7 & 8 W. 3. c. 7. giving an action for a false return of members of parliament is a remedial act; and the *venire facias* may be de corpore comitatus.

—If a declaration on a statute conclude *contra formam statuti*, the judgment need not.

—The judgment in an action on the case on statute by the party grieved may be *in misericordia*: but even if such a judgment were wrong, it is cured by the statute of *jeofails*.

—An action may be maintained on the stat. 7 and 8 W. 3. c. 7. for a false return of members of parliament, tho' there be no determination of the House of Commons on the right of election for that place.

—Vid. 1 Will. 125. S. C.

1745. 6.

MYDDEL-

TON

against

WYNN, Bart.
in Error.

The defendant pleaded the general issue; and on the trial the jury gave a verdict for the plaintiff with 1400*l.* damages, which together with the costs (being doubled) amounted to 3214*l.* The judgment was accordingly entered up for that sum; and the defendant below *in mercy* &c.

A writ of error was brought in the Exchequer-Chamber, where (besides two particular errors, which were afterwards cured by amendments in the King's Bench, vid. 2 *Str.* 1227.) five objections were taken to the record on behalf of the plaintiff in error. The case was argued three times, the first time by Sir *R. Floyd* for the plaintiff in error and Sir *T. Bootle* for the defendant, the second time by *Prime* King's Serjt. for the former and the Solicitor-General for the latter, and again by *Evans* for the plaintiff and the Attorney-General for the defendant; but after the first argument the two first objections appear to have been given up.

After the Court of Exchequer-Chamber had taken time to consider of the case,

Willes Lord Chief Justice *C. B.* delivered his own opinion and that of his Brethren, (except Mr. *J. Fortescue Aland* who was absent,) as follows.

"There are two particular errors assigned, besides the general errors, that there was no venire and no distringas: but they being both returned on the second certiorari, these two errors are answered, so that the case now comes before us only upon the general errors assigned.

And five objections were taken by the counsel for the defendant, the plaintiff in error; one to the process, two to the entering up of the judgment, and two on the merits.

As to the first error. It is that the venire facias which is now returned is de corpore comitatus instead of de vicineto; for though the 4th and 5th *Ann. c.* 16. *s.* 6 and 7. says "that every venire facias for trial of any issue in any suit shall be awarded of the body of the county where such is triable; yet there is a proviso

proviso in this act that it shall not extend to any action on any penal statute; that this was an action on a penal statute, and therefore plainly within the proviso. So that a question hath been whether this be a penal statute or not? But I shall give it another answer, that supposing it a penal statute, yet it is cured by statute 16 and 17 *Car. 2. c. 8.* which makes good a judgment after verdict, though the venue is wrong laid. But then it is said there is the same sort of proviso in the statute *Car. 2.* that it shall not extend to actions on penal statutes, so that the objection still remains: but we think this not a penal statute, but for this purpose to be considered as remedial. And we likewise think that this is cured by the 5 *Geo. 1. c. 13.* which enacts that no judgment on a verdict shall be reversed or stayed for any defect either of form or substance; and it is certain that this must be a defect either of form or substance, and therefore within this act (a).

1745, 6.

MYDDEL-
TONagainst
WYNN, Bart.
in Error.

The second objection is to the form of the judgment, and the next to form and substance. It is objected [that the judgment doth not conclude *contra formam statuti*; we have considered this both on the footing of precedents and of reason. As to precedents they are both ways; therefore the adding of those words could not have vitiated. But the question is whether it was necessary to put them in. To be sure in point of reason, there is no occasion. Indeed if the declaration had not laid the offence to be *contra formam statuti*, the judgment must be ill; because it would not have been an action on the statute, but at common law; therefore a judgment for double damages would be wrong. The defendant hath pleaded not guilty as to the whole charge in the declaration; therefore he hath said that he is not guilty of a fact *contra formam statuti*; the issue was on this fact, and the jury have found him guilty of making a false return *contra formam statuti*; the judgment hath pursued the verdict; and therefore we think this objection of no weight.

(a) See also *Merrick v. The Hundred of Offulstone*, *Andr.* 118, 119; and *French qui tam v. Wiltshire*, 2 *Str.* 1085. And now all doubt on this point is removed by the stat. 24 *Geo. 2. c. 18. s. 3.* which, after reciting the inconveniences arising

from the proviso in the stat. 4 & 5 *An. c. 16.* enacts that every venire facias in any action or information upon any penal statute shall be awarded of the body of the proper county where such issue is triable.

The

1745, 6.

MYDDEL-

TON

against

WYNN, Batt.
in Error.

The third objection is to the judgment, which concludes that the defendant is in *misericordiâ* instead of *capiatur*; and this is an objection to the substance as well as to the form. The answer given to it was that the entry was right: but even supposing it wrong, yet it is cured by the statute of *jeofails*. We are not all of us certain that this judgment is right, but the greater part of us think it is. This is an action on the case, which is to recover damages to the party grieved, and there the proper judgment is in *misericordiâ*; and the cases in which it should be by *capiatur* is where there is a fine to the King, as in *trespass* etc.; I mean that at common law there should be a *capiatur*. But we are all of opinion that supposing the judgment bad, yet it is cured by the statute of *jeofails*. Yet notwithstanding I shall mention some cases to shew where a *capiatur* is necessary, and where not, and on which we found our opinion that this entry of the judgment is good. The first is in 1 *Rol. Abr.* 222. *pl.* 11, where it is said that in actions of *trespass* upon the case the entry of the judgment shall be in *misericordiâ* and not *quod capiatur*. The next is an action on the stat. of *Edw.* 6. for not setting out *tythes*; *ib.* page 223. *pl.* 17. So in debt on 1 and 2 *Pb.* and *Mar.* for taking 10 *d.* for a distress instead of 4 *d.*, by which he became liable to a penalty of 5 *l.*; the Court held that the judgment ought not to be in *misericordiâ*. *North v. Wingate, Cro. Car.* 559, 560. So in *Plowd.* 118, 130, where the action was on the stat. 23 *H.* 6. the judgment was in *misericordiâ*. The case of *Waterhouse v. Bawde, Cro. Jac.* 134. also shews that where the action is brought *tam pro rege quam pro seipso* the King is to have a fine, but not where the action is brought only for the party; and where there is no fine to the King, the judgment should not be *quod capiatur*. As to the stat. 5 and 6 *W.* and *M.* c. 12. which takes away the *capiatur* fine in actions *vi et armis*; that does not apply to the present case any otherwise than as it explains the rule laid down here; for that takes it away in all actions *vi et armis*, which are the only actions in which it was used, and it shews the sense of the Legislature that they thought in *trespass* on the case *misericordia* was the proper entry (a).

(a) See also *Pullin v. Stokes, 2 H. Bl.* 6 *D. & E.* 255; and *Jenkinson v. Bates Rep.* 312; *Humble v. Bland*; in error. qui tam; in error; cited *ib.* 257.

But another answer may be given to this objection, that supposing this judgment wrong, yet it is aided by the stat. 16 and 17 Car. 2. c. 8. ; only indeed there is an exception of actions on penal statutes ; therefore if this be considered as an action on a penal statute, this objection is not aided. But we are all of opinion that this statute, which gives damages to the party grieved, though they are double damages, is a remedial act, because the damages are to be considered only as a satisfaction to the party. And this seemed to be the opinion of the Court of King's Bench in the case of *Philips v. Smith*, Com. Rep. 284, 5. in an action against a person for refusing to deliver a poll, in which case a penalty of 500*l.* is given. We think this is likewise cured by another statute, or at least this statute serves to explain the sense of the Legislature on the stat. 16 and 17 Car. 2. This is the 4 Geo. 2. c. 26. for turning the law proceedings into *English* ; for in *§. 4.* it is enacted that every statute for amending jeofails shall extend to all forms and all proceedings in courts of justice, *except in criminal cases*, when the forms and proceedings are in *English* ; and it concludes thus "And this clause shall be taken and construed in the most ample and beneficial manner for the ease and benefit of the parties, and to prevent frivolous and vexatious delays." So that supposing the act, on which this action is brought, is either penal or remedial, as this is not a *criminal prosecution*, the defect is aided ; for the section in the stat. 4 Geo. 2. must either be considered as an enacting clause, or as declaratory of the sense of the Legislature on the word "penal" in former statutes, and that by it they meant only *criminal prosecutions*. As to these points we are all of the same opinion.

Now I come to the fourth and fifth objections on the merits of the case ; and as to these we are all of the same opinion, except my Brother *Abney* ; and he only doubts, for if he were clearly of a different opinion, our opinions would be given *seriatim*. And he doubts whether this action is maintainable ; for he says that this action can be brought only in two instances ; 1st, When the return is made contrary to the last determination of the House of Commons of the right of election for such place ; 2dly, Where any officer wilfully falsely and maliciously makes a double return. Therefore as this is not an action for a double

1745, 6.

MYDDEL-
TONagainst
WYNN, Bart.
in Error.

1745, 6.

MYDDEL.

TON

against

WYNN, Bart.
in Error.

return, nor for making a return contrary to the last determination of the House of Commons, he thinks it is not maintainable.

I will first state the act of parliament; and then I will give the opinion of my Brothers (except my Brother *Abney*) and their reasons for it, in which I entirely concur with them; and afterwards some further reasons of my own, in which I have no authority to say that any of them agree with me. The stat. 7 and 8 *Wm. 3. c. 7.*, which is intituled "An act to prevent false and double returns of members to serve in parliament," enacts and declares (sect. 1.) that all false returns wilfully made of any knight of the shire, citizen, burghers, baron of the cinque ports, or other member to serve in parliament, are against law, and are thereby prohibited; and in case any person or persons shall return any member to serve in parliament for any county, city, borough, cinque port or place, contrary to the last determination in the House of Commons of the right of election in such county, city, borough, cinque port or place, *such return* so made shall and is thereby adjudged to be a false return. The second clause enacts that the party grieved, to wit, every person who shall be duly elected to serve in parliament for any county, city, borough, cinque port or place, by *such false return* may sue the officers and persons making or procuring the same, and shall recover double the damages he shall sustain by reason thereof, together with his full costs of such suit. And, to the end that the law may not be eluded by double returns, it is enacted (by sect. 4.) that if any officer shall wilfully falsely and maliciously return more persons than are required to be chosen by the writ or precept on which any choice is made, the like remedy may be had against him or them by the party grieved. And then the sixth clause enacts that all actions grounded upon that statute shall be brought within two years after the cause of action arises.

The fourth objection is that double damages are only given in case of a return made contrary to the last determination of the House of Commons. It is said that the words *such false return* mean only such return as was contrary to the last determination in parliament: but this may receive several answers.

But

But in order to understand the meaning and sense of this act, it will be necessary to consider the title and preamble and every part of it. And to be sure it appears by the title as well as preamble that this act was made in order to give a remedy for *all* false and double returns. And we think the word *such*, even considered grammatically, must relate to all that went before, otherwise other words would have been inserted which are not here. Besides it would be strange to construe it otherwise; for suppose an act of parliament shall begin with saying, that stealing *all* cattle is felony, and lest any doubt should arise on the meaning of the word "cattle," it should afterwards say that *sheep* shall be considered as *cattle*, and then enact that all *such* stealing shall be felony without benefit of clergy, would it not be absurd to say that the word *such* should relate only to *stealing sheep*? Several absurdities and injuries would follow from the plaintiff's construction of this statute, and that ought carefully to be avoided in the construction of acts of parliament. If the word "such" did not relate to *all* false returns willfully made, a person could only have a remedy for such returns as were made contrary to the last determination in parliament: whereas the remedy was intended to be general; and it might seldom happen, be the return never so false and malicious, that it is a return contrary to the last determination in the House of Commons. According to that construction a returning officer who returned a person who had only two votes, instead of him who had ten, would not be liable to an action, if there were no determination by the House of Commons. But this is certainly such a false return for which the act intended to give a remedy; and to determine otherwise would be to make the remedy partial when the act intended it should be general. Another circumstance, which shews that this act extends to all offences of this nature, is that it is to extend to *all* counties &c: whereas the determinations of the House of Commons, generally speaking, are on elections for *boroughs* with respect to the right of voting. This we think an answer to this objection.

The fifth objection is that it does not appear by the declaration that this petition hath been determined in the House of Commons, but may yet come in question, and from thence it

1745, 6.

MYDDEL-

TON

against

WYNN, Bart.

in Error.

1745, 6.

MYDDEL-

TON

against

WYNN, Bart.

in Error.

is argued that the Courts of *Westminster-Hall* ought not to proceed in actions of this nature, while there is the least possibility of the same question coming before the House of Commons, because there may be a clashing in the determinations, and they are the proper Judges of their own elections. I must admit that, if it be necessary to set forth such a previous determination, no such determination appears in this declaration, for it is only said that they determined the return to be wrong, and therefore ordered the names to be altered; and it is plain that this was only a determination that the return was wrong, not that it was *false*; and it might be wrong without being false; as for instance, if it had been made by a wrong person; and by the liberty given to *J. Myddelton* to apply again within fourteen days it seems that the merits never came in question. We cannot here take notice of the rules of the House of Commons in proceedings of this nature, and therefore cannot conclude, because *J. Myddelton* did not apply within the fourteen days given to him, that therefore he was concluded. There are four persons, who might bring these petitions. 1st, The voters for Sir *W. W. Wynn*. 2dly, Sir *W. W. Wynn* himself. 3dly, The voters for *J. Myddelton*; 4thly, *J. Myddelton* himself; and we cannot judicially take notice, but that the right of election was put off.

Then as it does not appear by the declaration that there was a previous determination in the House of Commons, the question now is whether it be necessary that there should be any such previous determination. The cases cited to shew that it is necessary are most of them little to the purpose. The first is the case in *Plowd.* 118. That was an action on the stat. 23 *H. 6.*, which is worded in quite a different manner from the present: but if this case had any weight, it is rather an authority for our opinion, because no such previous determination was there set forth; and though the case was very strenuously argued, this objection was not taken. The next is *Nevill v. Stroud*, 2 *Sid.* 168. but there no judgment was given by the Judges in the Exchequer, who were all assembled there for that purpose; and, as it is said in 3 *Lev.* 30., it was adjourned into parliament propter difficultatem, and slept there without any determination; so that case is of no authority one way or the other. The case
of

of *Bernadiston* and *Some*, 2 *Lev.* 114. was an action for a double return, three of the Judges held that it lay, and one doubted; error was brought on this in the Exchequer-Chamber, and that judgment was reversed (a). But that was an action for a double return, and not for a false one; so (it is said) it does not affect the present case, though I must own I do not understand the distinction laid down in that case between a false and double return as to the actions lying or not lying at common law, where it is alleged (as it was in that case) that the return was made *falsely and maliciously*. However that was an action at common law, so it in nowise resembles the present case. The case of *Onslow v. Rapley*, 3 *Lev.* 29. was an action for a double return, and is founded on *Bernadiston's* case, and it was there holden that the action lay not: but that case proves too much, for it was there said that it would be presumption to meddle with elections before they had been determined in parliament. The next case, when it was cited at the bar, staggered us all, that of *Prideaux and Morice*, 1 *Lutw.* 82 to 89. *Salk.* 502. and *Farresly* (b) 13 and 14. I believe every one imagined at first when it was cited that that was an action on this statute, but on looking into it we find that that was not an action on the statute, but at common law; 1st, Because by the pleadings, which are in *Lutwich*, it is not laid to be *contra formam statuti*; 2dly, Because by the arguments it appears that it was an action at common law; and this entirely altered our opinion of the present case. There are things in Lord *Trevor's* argument in the Common Pleas, and Lord *Holt's* in the King's Bench, strong as to this point. Lord *Trevor* seemed to give his opinion that an action for a double return would not lie at common law: but they were all clearly of opinion that there ought not to be an action at common law, before there had been a determination in parliament. And the reason given both by Lord *Trevor* and Lord *Holt* is, because there might be different determinations, and the House of Commons are the proper Judges of their own elections. If this were a determination on the 7 & 8 *W.* 3. the objection would be great; but as it is not, that authority is at an end at once; because it is certain that an act of

1745, 6.

MYDDEL-

TON

against

WYNN, Bart.

in Error.

(a) And that judgment of reversal | Lords. Vid. 1 *Lutw.* 89.
was afterwards affirmed in the House of | (b) 7 *Mod.* 13.

1745, 6.
 MYDDEL-
 TON
 against
 WYNN, Bart.
 in Error.

parliament may give the Courts at *Westminster* a jurisdiction in cases of this nature, though they had none at common law, because the House of Commons is party to every act and therefore is bound by it. But we think the argument made use of by the Judges in that case makes against this objection in the present. It was there objected that an inconvenience would arise, as there might be a clashing of determinations: the answer was, where an act of parliament gives a jurisdiction, we may exercise it in all cases. This shews that they did not consider this on the act of parliament; for if they had, this objection would not have held at all. I have here a report of the determination of the House of Commons in the case of *Ashby* and *White*, which says that the House of Commons have a right to determine their own elections, except in cases particularly provided for by act of parliament; and it would be great inconvenience if it were otherwise.

On this point I give no opinion of the rest of the Judges, but speak this as my own opinion only; though it has never yet been determined, I should have no doubt but this action would lie at common law; and it would be a reflection on the law to say it would not, because here is certainly *damnum cum injuriâ*, which by the policy of the common law ought to have some remedy (a). But the construction contended for by the plaintiff in error would overturn this whole act of parliament, as it would deprive the party even of having an action on this statute; for the action must be brought within two years after such false or double return made; and therefore if this action is not to be brought until the matter is determined in parliament, they might keep the petition so long depending, that the time for bringing the action would be expired, and then the party would be without remedy. With regard to the case of *Prideaux v. Morice*, which was much relied upon; I cannot (speaking for myself only) hear it mentioned, without entering my protest against that part of the determination, which says that the determinations of the House of Commons shall be final and conclusive on the Courts of *Westminster-Hall*. 1st, Be-

(a) Vid. *Ashby v. White*, 2 *Ld. Raym.* 838; *Pasley v. Freeman*, 2 *D. & E.* 51. 577. &c; and *Winsmore v. Greenbank*, sup.

cause the method of trial there is different from that in *Westminster-Hall*; had they the same authority to inquire into those things that we have, I should be content. Next they do not make their determination on oath, whereas we are sworn to determine according to right; they cannot try by juries; nor can they examine the witnesses on oath (a).

1745, 6.

MYDDEL-

TON

against

WYNN, Bart.
in Error.

As to the objection of clashing in jurisdictions; that does not hold, unless their determinations were in idem. Indeed would an assize or ejectment lie for a seat in the House of Commons, and were we to determine one way and they another, there might be said to be a clashing; but here we determine on that which they cannot; for though they may determine as to the right of sitting there, yet we are the only persons who can give damages. I shall put one common instance; suppose an action of trespass and assault is brought and an indictment for the same assault in another court; in one the defendant may be found guilty, in the other he may be acquitted; and it is possible that he may be found guilty and acquitted before the same Judge for the same offence, as where the same Judge of Nisi Prius sits at both bars; and yet there would be no clashing in these determinations, for he determines on different evidence; in one case the party himself may give evidence, in the other not. So it may be in cases of wills, where lands and personal estate are disposed of by the same will, and the party goes into the Ecclesiastical Court to establish the will as to the latter, and comes into the Courts of law to establish it as to the former, and the question in both Courts is, whether the testator were compos or not; the Ecclesiastical Court may hold it good as to the personal estate, and these Courts hold it bad as to the real, and yet there would be no clashing of jurisdiction, because the determination would not be ad idem, and there no doubt could arise which judgment to execute. Another reason why the Courts of *Westminster* should not be concluded is, that it is a rule that no

(a) But a tribunal has been since constituted for the determination of contested elections by a select committee of the House of Commons, who are themselves sworn to determine according to the evidence, and who have the power of sending

for and examining witnesses on oath. Vid. stat. 10 Geo. 3. c. 16.; and 11 Geo. 3. c. 42., both made perpetual by 14 Geo. 3. c. 15.; and since amended by 25 Geo. 3. c. 84; 28 Geo. 3. c. 52; 32 Geo. 3. c. 1; and 36 Geo. 3. c. 59.

determination

1745, 6.

MYDDEL-

TON

against

WYNN, Bart.

in Error.

determination between any two persons can be conclusive as to a third; now the determination in the House of Commons is only between the two members; here it is between one of the members and the sheriff, who is a third person. I shall mention but one reason more, which is that the greatest injury of all might by this means go unpunished; for it may happen, and frequently has happened, that a man has been so impoverished by the expences of his election, that he has not money enough left to bring his petition before the House, and yet till he does bring his petition he will be denied the only means he has of reparation, bringing his case before the Courts of *Westminster-Hall* in order to recover damages. These I mention only as my own private reasons.

But we are all of opinion that supposing this previous determination in the House of Commons not here set forth and that it ought to have been set forth originally, yet it is cured after a verdict (a); for as the jury have found for the plaintiff, we must presume that proper evidence was given to induce them to find this verdict, otherwise the Judges would have directed them otherwise.

So the judgment must be affirmed."

(a) Vid. *Macmurdo v. Smith*, 7 D. & E. 518., and the cases there referred to.

H. 19 Geo. 2.
Tuesday,
Feb. 12th.

The Mayor Bailiffs Burgeffes and Commonalty of
BEDFORD *against* The Bishop of LINCOLN and
WILLIAMS.

[M. 17 GEO. 2. Rot. 1726, 1727, 1728, 1729.]

A quare im-
pedit may be
brought for
a church and
an hospital.

IN quare impedit, the plaintiffs in their declaration alleged that they were, and for a long time past had been, seised of the advowson of the church of *Saint John the Baptist* and the hospital of *Saint John* in *Bedford* as in gross as of fee and right, and being so seised they presented to the said church and hospital, being vacant, one *J. Towersey* their clerk, who upon the presentation of the said mayor bailiffs burgeffes and commonalty was admitted instituted and inducted into the same in the

the time of Queen *Anne*; and that the said mayor bailiffs bur-
gesses and commonalty being so seised, the said church and
hospital afterwards became vacant by the death of the said
J. Towersey and still is vacant &c.

The Bishop in his plea claimed nothing in the said church
nor in the advowson thereof, but the admission institution and
induction of parsons to the same church &c, and other things
which belong to the ordinary as ordinary of the same place and
church.

The defendant *Williams* put in three pleas. 1st, After pro-
testing that the mayor &c were not seised at the time when
Towersey was admitted &c, he admitted that *Towersey* on the
presentation of the mayor &c was admitted instituted and in-
ducted into the said church and hospital in the time of Queen
Anne, and that after his admission *Towersey* died &c; but he
pleaded that the said church and hospital at the time of that ad-
mission and from time immemorial had been, and still were, a
lay fee and estate and not presentative. He then alleged that
before *Towersey*'s admission and before the said mayor &c had
or claimed any thing in the church or hospital King *Henry* the
Eighth was seised in his demesne as of fee of and in the said
hospital, to which the said church then was and from time then
immemorial had been and still was appurtenant, in right of his
crown; that on his death the said hospital, to which &c,
descended to King *Edward* the Sixth, and on his death to
Queen *Mary*, and on her death to Queen *Elizabeth*, who on
the 20th of *July* in the 18th year of her reign by letters patent
granted the said hospital, to which &c, by the name of *Saint*
John's Hospital and all her lands tenements rents services and
hereditaments whatsoever with their appurtenances to the said
hospital belonging or appertaining to *J. Farnham* in fee. The
defendant in this plea then deduced a regular title to the said
hospital, to which &c, from *J. Farnham* to *G. Williams* the
defendant's father in fee in 1678; and then set forth that the
said *G. Williams* being so seised the said mayor &c on the 14th
day of *April*, 13 *An.* unjustly and without any judgment dis-
seised the said *G. Williams* thereof, whereby the said mayor &c
were seised of the said hospital to which &c with the appur-
tenances

1745, 6.

The Mayor
&c of BED-
FORD
against
The Bishop
of LINCOLN
and WIL-
LIAMS.

1745, 6.

The Mayor
&c of BED-
FORD
against
The Bishop
of LINCOLN
and WIL-
LIAMS.

tenances by that disseisin, and being so seised thereof by that disseisin they presented the said *J. Towersey* to the said church and hospital, as to a church and hospital presentative, who on the presentation of the said mayor &c was admitted instituted and inducted into the same as to a church and hospital presentative; that the said mayor &c being so seised of the said hospital, to which &c, by their disseisin, the said *G. Williams*, the defendant's father, afterwards on the 1st of *May* 1724 re-entered into the said hospital to which &c with the appurtenances and was thereof seised in his demesne as of fee as of his first and former estate; and being so thereof seised he the said *G. Williams* (the father) afterwards on the 1st of *June* 1740 died so seised of such his estate of and in the said hospital to which &c with the appurtenances, upon whose death the said hospital to which &c with the appurtenances descended to the defendant as son and heir, whereupon the defendant entered into the said hospital to which &c with the appurtenances, and was and still is seised thereof in his demesne as of fee.

The second plea was precisely similar to the first throughout, except that it spoke of the *hospital only*, and dropped every expression relating to the church.

In the last plea the defendant, after protesting that the mayor &c at the time of the admission institution and induction of *J. Towersey* into the said church (not saying any thing about the hospital) were not seised of the advowson of the said church &c, pleaded that the said church then from time immemorial had been and then was a church donative; that before and at the time of the death of *Towersey* the defendant was seised of and in the said donation or gift of the said church as in fee; that all those, whose estate the defendant had, being so seised of and in the donation or gift of the said church from time immemorial as often as the church became vacant had been used and accustomed and ought to give the said church to any clerk to be held by such clerk for the term of his life &c; and that the said church being then vacant it belonged to the defendant to give grant and confer the same &c.

In

In answer to the bishop's plea, as he claimed nothing in the church or advowson but the admission &c as ordinary, and said nothing in particular concerning the hospital, the plaintiffs prayed judgment and a writ to the bishop &c; upon which it was adjudged that the plaintiffs should recover their presentation to the said church and hospital against the bishop, with a stay of execution until the pleas between the other parties were determined.

To the first of the other defendant's (*Williams's*) pleas the plaintiffs replied that at the time of the admission institution and induction of *Towersey* into the said church and hospital the same church and hospital were and still are presentative and not a lay fee and estate, as in the plea is alleged. To the second plea that the said hospital at the time of that admission &c was presentative and not a lay fee. And to the third plea that the church at the time of *Towersey's* admission was and still is a church presentative and not a church donative.

To these replications the defendants demurred generally.

After three arguments at the bar, on *Wednesday, February 1st, 1743, April 28th, 1744, and Tuesday, November 13th, 1744,*

The Court on this day gave

Judgment (a) for the plaintiffs.

(a) The grounds and reasons of this judgment do not appear in the Lord Chief Justice's note books or papers: but the following account is taken from Mr. J. Abney's note book.

"After many arguments at the bar, 12th of February 1745 the plaintiffs had judgment.

The Court resolved that the objection, that no quare impedit will lie for a church and hospital, because the one is ecclesiastical and the other temporal, is an objection of no weight, and the saying in *Ld. Raym.* 199. is a dictum only. A rectory and vicarage are of a different nature. But in this declaration it appears that the church and hospital are one and the same thing. And *Rest. Entr.* 506. b. is a good

precedent. In *Co. Lit.* 342. an hospital may be either a lay or ecclesiastical fee: non constat which this is. If a quare impedit does lie, it must be presentible, and so they are convertible terms. *Co. Lit.* 342. *Register* 31. (A), stat. *W. 2. c. 5. s. 4. Fitz. N. B.* 34. (E), are great authorities that a quare impedit will lie for an hospital, and that it may be presentible. And for these reasons the Court held the declaration in the case at bar to be good.

As to the pleas of the defendants, they are bad. In a quare impedit it is necessary for the plaintiff to allege one presentation in himself or those under whom he claims. A seisin and a presentation are necessary, which are the plaintiff's possession; and it is equally necessary for the defendants

1745, 6.

The Mayor
&c of Bury
FORD
against
The Bishop
of LINCOLN
and WILLIAMS.

1745, 6.

The Mayor
&c of BED-
FORD
against
The Bishop
of LINCOLN
and WIL-
LIAMS.

defendants to traverse one of them. But in these pleas the defendants have confessed the presentation, and endeavoured to avoid it but not traversed, for a protestando is no traverse: besides the pleas have separated the church from the hospital, which are one entire thing; and one plea cannot be taken in aid of another. The pleas are also defective, because the de-

endant *Williams* has set up no presentation or title either in himself or those under whom he claims.

The Court inclined to think that the replications were good, as following the three pleas; but they founded their judgment on the validity of the plaintiff's declaration and the defects in the defendant's three pleas." MS. Abney J.

E. 19 Geo. 2.
Monday,
April 21st.

THOMAS DAVIES on the Demise of JOHN TULLY
against WILLIAM HAMLIN, an Infant, by his
Guardians, and Others his Tenants.

A. having an
only child B.
(a daughter)
devised lands
to a child
with which
his wife was
then enient,
if a male;
but if a fe-
male, then
the lands
were to be
divided be-
tween B. and
that female;
and if they
both died
without issue,
then to C. in
fee — The
child was af-
terwards
born, and
was a male:
held that he
took a fee,
either by the
will or by de-
cent.

"IT came before the Court upon a case reserved by my
Brother *Burnett* at the *Suffex* assizes held at *Lewes* on the
10th of *August* 1745.

William Hamlin, being seised in fee of the premises in ques-
tion, by his will dated the 24th of *April* 1662, devised them in
the following words; "I give my freehold land lying in the
parish of *Ardingly* and *West Hoathly* (being the premises in
question) unto the issue of my wife which she now travaileth
withal, in case it be a man child: but if it happen to be a
woman child, then my will is that it shall be equally divided
between my daughter *Elizabeth* and the said child which my
wife now travaileth withal; and if it shall happen that my
daughter *Elizabeth* shall die without issue, then the child that
my wife now travaileth withal shall wholly enjoy the said land:
but if it shall happen that they both die without issue, then my
will is that *Thomas* and *William Tully*, sons of my brother *John*
Tully, shall have the said parcel of land to them and their heirs
for ever." The devisor died a few days afterwards leaving his
wife enient, who was brought to bed of a son in *July* 1662
named *William*, and who was his only son and heir at law.
He entered, and being seised and possessed of the premises in
Hilary term 1692 levied a fine sur conuſance de droit come ceo
&c to the use of himself and his heirs; and by his will dated
the 17th of *August* 1741, duly executed, devised the premises

to

to the defendant *William Hamlin* and his heirs, and died without issue in the month of *December* 1743, having been in possession of the premises from his birth until the time of his death; and upon his death the defendant, as his devisee, entered on the premises and hath been in possession ever since. *Elizabeth* the sister died without issue in the life-time of her brother. *Thomas Tully* died in the lifetime of his brother *William*; and afterwards *William* died without issue in the lifetime of *William Hamlin* the son, leaving *John*, the lessor, his son and heir, who after the death of *William Hamlin* the son on the 25th of *April* 1745 made an actual entry on the premises in order to avoid the fine, and made a demise of the premises to the plaintiff.

1746.
DAVIES
dem. TULLY
against
HAMLIN.

The questions reserved were,

1st, Whether *William Hamlin* the son were seised of an estate in fee-simple in the premises.

2dly, If he took a less estate, whether the fine above mentioned discontinued the remainder limited to *Thomas* and *William Tully*, and took away the entry of the lessor of the plaintiff.

As to the first question (a), I, my Brother *Abney*, and my Brother *Burnett*, (absent Mr. *J. Fortescue A.*) were all clearly of opinion that *William Hamlin* the son was seised of an estate in fee-simple. For the devise over to the sons of *William Tully* was only in case (b) the issue of his wife, which she then travailed with, was a woman child: if it were a male child, as it was, the devise to *Elizabeth* his daughter and the devise over to the sons of his brother never took place at all. It was therefore quite immaterial what estate *William* the son took by the will, whether an estate for life, in tail, or in fee-simple, because as soon as he was born, whatever estate did not pass to him by the will descended to him as heir at law to his father, as being an interest undisposed of.

This is so clear upon the face of the will that there was no occasion to cite any cases at all, or to take notice of any of those which were cited. And this being so clearly with the defendants, there was no occasion to give any opinion on the second point reserved."

(a) The case was argued by *Wynne* | (b) Vid. *Roe v. Wickett*, Hil. 15 G. 2.
Serjt. for the plaintiff and *Prime King's* | sup. 303.
Serjt. for the defendants.

1746.

E. 19 Geo. 2.
Tuesday,
May 6th.Sir P. T. CHETWODE Bart. *against* J. CREW,
J. KIDD, and G. STAUNELEY.

[Hil. 16 GEO. 2. Rol. 1049.]

A Court
baron cannot
be holden
without two
freehold te-
nants of the
manor.

—Such free-
hold tenants
cannot be
created at
this day.

—If the lord
now convey
part of the
demesnes of
the manor
to A. and his
heirs and
other part to
B. and his
heirs, to hold
as of his ma-
nor by fealty
and suit of
court, and
then hold a
court before
those two te-
nants as free
tenants, the
court is im-
properly
holden, and
any amerce-
ment at that
Court is con-
sequently
bad.

IN replevin for taking the plaintiff's saddle in a place called the Stable at *Oakley* in the county of *Stafford*, the defendant *Crew* avowed, and the two other defendants acknowledged, the taking as a distress for not doing suit at the defendant *Crew's* Court in five different avowries.

In the 1st avowry it was stated that the plaintiff was seised of an ancient messuage with the appurtenances in *Oakley*, whereof the place in which &c is and at the said time when &c and also time immemorial was parcel, in his demesne as of fee, and held the said tenements &c of the defendant, *J. Crew*, as of his manor of *Muckleston* by fealty and the yearly rent of 3*s.* payable at the feasts of *Saint John the Baptist* and *Saint Martin the Bishop* in the winter by equal portions, and also by the service of doing suit at the Court of the said manor holden and to be holden from three weeks to three weeks within the same manor, of which said services and rent the defendant *Crew* was seised by the hands of the plaintiff as by the hands of his very tenant, to wit, of the said fealty and suit of Court as of fee and right and of the rent aforesaid in his demesne as of fee; and because the said suit of Court at a Court of the defendant *Crew* of his said manor held &c on the 23d of *September* 1740 was not done and performed, the defendant *Crew* in his own right and the other two defendants as his bailiffs acknowledged the taking &c for the said suit at the said Court so undone and unperformed &c.

The three next avowries only differed from the first in respect to the rent; in the second it was alleged that the rent was payable yearly at *Saint Martin's the Bishop*; in the third that it was payable half yearly at *Lady-day* and *Michaelmas*; and in the fourth at *Michaelmas* only. The fifth and last avowry alleged that the place where &c was parcel of an ancient messuage with the appurtenances in *Oakley*, and was and from time immemorial

morial had been holden (among other things) of the manor of *Muckleston* by fealty and the service of doing suit at the Court of the said manor holden and to be holden from three weeks to three weeks within the said manor, of which manor with the appurtenances the defendant *Crew* on the 23d September 1740 and long before was seised in his demesne as of fee; and then the defendants avowed the taking &c as a distress for the said suit at the said Court so undone and unperformed.

1746.
CHETWODE
Bart.
against
CREWE.

The plaintiff, in his first plea in bar to the first avowry, after protesting that he did not hold the said tenements &c of the defendant *Crew* as of his manor of *Muckleston* by fealty and the yearly rent &c and also by the service of doing suit at the supposed Court of the said supposed manor &c, pleaded that the defendants of their own wrong took the said saddle, and traversed the holding of the defendant's (*Crew's*) Court for the supposed manor &c, in manner and form as was by the defendants in the avowry and cognisance alleged. 2dly, He pleaded that the said tenements with the appurtenances whereof &c were out of the fee and lordship of the defendant *Crew*. 3dly, After protesting that the defendant *Crew* was never seised of the said services &c as alleged, he pleaded that he held the said tenements &c of the defendant *Crew* as of his said manor by the rent of 1 s. only payable every year at the feast of *Pentecost*, traversing that he held them of the defendant *Crew* by fealty and the yearly rent of 3 s. payable at the feasts of *Saint John the Baptist* and *Saint Martin the Bishop*, and also by the service of doing suit at the said court &c. 4thly, He pleaded that he held the said tenements &c of the defendant *Crew* &c by the yearly rent of 1 s. payable at the feast of *Pentecost*, traversing that the defendant *Crew* was seised of the said service of suit of court by the hands of the plaintiff as by the hands of his very tenant, in manner and form &c.

To the second third and fourth avowries the plaintiff pleaded four several pleas similar to those pleaded to the first avowry, *mutatis mutandis*.

To the fifth avowry he pleaded, 1st, that the defendants of their own wrong took the said saddle, traversing the holding of

1746.
 CHETWODE
 Bart.
 against
 CREWE.

the defendant's (*Crew's*) Court modo & formâ &c; 2dly, That they took &c of their own wrong, traversing that the said messuage with the appurtenances whereof &c at the time when and also from time immemorial was holden of the said manor by fealty and the service of doing suit at the court &c, as the defendants alleged &c.

Issues were afterwards taken on each of these pleas.

On the trial of the cause at the assizes at *Stafford* in *March* 1742 before Mr. *J. Denison* a verdict was found on several issues, as follows;

Upon the second and third issues on the first avowries, for the defendants generally.

Upon the first and fourth issues, for the defendants, subject to the opinion of the Court on a case reserved.

On the third issue on the second avowry, for the plaintiff.

On the second issue for the defendants generally.

On the first and fourth issues for the defendants, subject to the case as above.

On the second issue on the third avowry, for the defendants generally.

On the third for the plaintiff.

On the first and fourth issues for the defendants, subject as above.

On the second issue on the fourth avowry, for the defendants generally.

On the third for the plaintiff.

On the first and fourth for the defendants, subject as above.

On both the issues on the last avowry for the defendants, subject as above. And if the Court should be of opinion that judgment should be entered for the plaintiff, then the jury found 1*s.* damages for him and 40*s.* costs: but if they should be of opinion that judgment ought to be entered on any of the avowries for the defendants, then they found the like damages and costs for them.

As to those issues, on which the case was reserved, the case appeared to be thus; that the defendant *J. Crew* had for many years

years past been and still was lord of the manor of *Muckleston*, of whom the plaintiff held the messuage and stable wherein &c as of his said manor by fealty and the yearly rent of 3s. payable at the feasts of the nativity of *Saint John the Baptist* and *Saint Martin the Bishop* by equal portions, and also by the service of doing suit at the court of the said manor from three weeks to three weeks; and that before the plaintiff had any estate in the tenements in which &c one *James Chetwode*, his ancestor and whose heir the plaintiff is, paid the said rent and did suit to the said court in person. That the plaintiff became seised of the said premises in the year 1733 on the death of his late father *John Chetwode*, and had ever since duly and regularly paid the said yearly rent of 3s. to the defendant *Crew*. That *S. Davison* was at the time of holding the several courts hereafter mentioned and had been for many years before another ancient freehold tenant of the said manor and owing suit to the lord's said court there. That the defendant *Crew*, being in 1736 seised of the said manor, conveyed part of the demesnes thereof to *John Crew* the younger and his heirs to hold to him as of his said manor by fealty and suit of court, and at the same time conveyed other part of such demesnes to *C. Crew* and his heirs upon the same tenure. That at a court holden in and for the said manor on the 3d of *October* 1737 before *T. Read* steward of the said manor the said *John Crew* the younger and *C. Crew* appeared in person and did their suit and service as freehold tenants of the said manor. That afterwards on the day mentioned in the several avowries, to wit, on the 23d of *September* 1740 *T. Read*, the then steward, held another court in and for the said manor, at which proclamation was duly made before the steward of the said court, and the said *John Crew* the younger and *C. Crew* appeared there in person as freehold tenants of the said manor, and did suit and service there; and they the said *John Crew* the younger and *C. Crew* together with divers other inhabitants not freeholders within the said manor were sworn upon the homage there: but neither the plaintiff or the said *S. Davison* appeared at that court, but made default.

1746.
CHETWODE
Bart.
against
CREW.

The jury having found that the messuage and premises in the pleadings mentioned were within the fee and lordship of

1746.
CHETWODE
Bart.
against
CREWE.

the defendant *Crew*, and that the plaintiff and *S. Davison* were the only remaining ancient freehold tenants of the manor, it was agreed that the defendant *Crew* had a right to hold a court-baron there. But the

First question reserved for the consideration of the Court was whether, as no freeholders but *John Crew* the younger and *C. Crew* the newly-created freeholders appeared or were sworn upon the homage at the court held on the 23d of September 1740, though notice was duly published and the plaintiff personally summoned, that court were or were not legally holden.

Secondly; It not appearing that the plaintiff had ever actually performed his suit of court, the next question arose on the issues joined upon the defendant *Crew*'s feisin of this service by the hands of the plaintiff as of his very tenant; whether feisin of the rent by his hands did not amount to a feisin of the suit of court, and if not, whether the want of such feisin could prevent the defendants' having judgment on such of the avowries wherein feisin thereof was alleged.

Thirdly; If the Court should be of opinion that the defendant *Crew* were not seised of such service by the hands of the plaintiff, and for want thereof could not have judgment on any of those avowries wherein such feisin was alleged, whether the tenure by fealty rent and suit of court as above stated were not sufficient evidence of the tenure alleged in the last avowry so as to entitle the defendants to judgment thereon, though proved to be larger and more extensive than that alleged in the last avowry.

This case was twice argued; the first time by *Bootle* Serjt. for the plaintiff and *Draper* Serjt. for the defendants on the 5th of February 1745, and again on this day by *Wynne* Serjt. for the former and *Willes* King's Serjt. for the latter, when

The Court gave

Judgment (a) for the plaintiff.

(a) The reasons given by the Court do not appear among the papers of the Chief Justice: but the following account is taken from Mr. J. *Abney*'s note-book. "Upon

“Upon several avowries the questions were

1st, Whether a tenure can be created at this day?

2dly, Whether a court-baron can be holden by the steward?

3dly, Whether two suitors or freeholders at least are not the necessary judges of the court?

And after two arguments *Willes* C. J., *Abney* and *Burnett* Justices, were of opinion that no tenure can be created at this day (1). That the steward alone, without two (2) freeholders at least, cannot hold a court-baron. And that the suitors (3) are the judges and not the steward.”

1746, 7.

(1) *Stat.* 18 *Edw.* 1 c. 1. and *Bradshaw v. Lawson*, 4 D. & E. 443.

(2) *Vid. Co. Lit.* 58. a; *Bro. Abr.* title “*Comprise*,” pl. 31; and *ib.* title “*Manor*,” pl. 5; 2 *Rel. Abr.* pl. 2; *Yelv.* 190, 191; *R. v. Staverton*; *Glover v. Lane*, 3 D. & E. 122. 447, and *Bradshaw v. Lawson*, 4 D. & E. 446. An amercement at a court-baron on a free suitor of the manor must also be assessed by two freehold tenants of the manor. *Baldwyn v. Tudge*, 2 *Wils.* 20; and S. C. MS. *Willes* Ch. J. which agrees with the report in *Wilson*, with this additional fact that it was stated negatively in the special case that the two assessors, though they resided within the manor, “were not freehold tenants or free suitors of the said manor.”

(3) *Vid.* 4 *Inst.* 2.

GREENHOW against ILSLEY and Four Others.

THIS was an action on the case. The first count in the declaration stated that before and on the 1st of May 1743 and ever since the plaintiff was possessed of an ancient messuage and divers, ff. 200 acres of land with the appurtenances at Sandhurst, in the county of Berks, and by reason thereof had and of right ought to have right of common of pasture for all his commonable cattle levant and couchant in and upon the said messuage with the appurtenances in Sandhurst Common at all times of the year, except upon and from the 10th of June until and upon the 10th of July, yet that the defendants on 20 acres of the soil of the said common wrongfully cut and dug turves, to wit 100 cart-loads of turves, and carried them away, whereby the plaintiff could not enjoy his common of pasture in so large and beneficial a manner as he ought &c. In the second count the plaintiff claimed a right of turbary on the same common in respect of an ancient messuage &c.

All the defendants pleaded the general issue.

set forth his title: but in an action against a stranger and wrong-doer, he need only state his possession.

Hil. 20 G. 2.
Wednesday,
Feb. 4th.

If, to an action on the case by a commoner for injuring his right of common, the defendant plead that he dug turves under a license from the lord, he should add that sufficient common was left for the commoner; and if he do not, the plaintiff need not reply that sufficient common was not left.

—In an action by a commoner against the lord for injuring his right of common, he must state his possession.

1746, 7.

GREENHOW
against
JLSLEY &c.

And four of them, as to the first count, pleaded that *A. Williamson* was seised in fee of the manor of *Sandhurst*; and that the defendants as his servants and by his command cut and dug the said 100 cart-loads of turves &c, as being in his several soil and freehold, and carried them away for his use, as it was lawful for them to do. To the second count they pleaded a similar plea.

The plaintiff new assigned, as to the first count, that the turves therein mentioned were cut and dug for sale, and carried away and sold, and were other 100 cart-loads of turves than those in the first special plea mentioned to be dug taken and carried away for the use of *A. Williamson*; and the like as to the second count.

To the whole of the new assignment the defendants rejoined that *A. Williamson* long before the said time when &c, *J.* on the 27th of *October* 1735, and before was and still is seised in fee of the manor, and that he then gave and granted to one *T. Solmes* in his lifetime license and liberty to cut and dig turf and peate for sale from off the said place called *Sandhurst Common*; and to take and carry away the same and to sell and dispose thereof for his own use at his own will and pleasure, to have and to hold the said license and liberty unto the said *T. Solmes* from the feast of *Saint Michael* then last past for 99 years if *T. Solmes* should so long live; by virtue of which license and liberty these four defendants during the lifetime of *T. Solmes*, *J.* on the 1st of *May* 1743, and on divers other days &c, as servants of *T. Solmes* and by his command cut and dug the said turves &c for the purpose aforesaid, and took and carried them away and delivered them to and for the use of *T. Solmes*, as it was lawful for them to do &c.

To this rejoinder there was a general demurrer, and joinder in demurrer.

Belfield Serjt. for the plaintiff insisted that the lord of the manor could not justify cutting turves, so as to prejudice the rights of the commoners, and consequently could not give a license

to others to do that which he could not do himself. And that the plaintiff was not obliged to reply that there was not sufficient common left, because it was the gift of his action, and was already set forth in the declaration. *Smith v. Feverell*, 2 Mod. 6.

1745, 7.

GREENHOW
against
ILSLEY &c.

Draper Serjt. for the defendants. Though the commoners can only take turves for fuel, the lord may take them for sale. Besides the plaintiff should have shewn his title. *Wagstaff v. Rider*, Com. Rep. 341., the action being brought against those who justify under a terre-tenant. It clearly would have been necessary, if the defendant were owner of the soil, *Hunt v. Gauch*, T. 2 Geo. 2. B. C. Rol. 596, and this is the same thing (a); whereas the plaintiff relies merely on his possession.

Willis Lord Chief Justice was opinion that the defendants should have averred that there was sufficient common left for the plaintiff; and that the plaintiff was not obliged to reply it, as it was already alleged in the declaration. As to the objection that the plaintiff ought to have set forth his title, which it was insisted he ought to have done against a terre-tenant, his Lordship gave no opinion upon that point, because the defendants only claimed under a license, which having exceeded they must be considered as wrong-doers and strangers.

The three other Judges were of the same opinion; *Burnett* J. adding that, admitting Serjt. *Draper's* rule that the title must be set forth in an action against the owner of the soil, the defendants in this case must be considered as wrong-doers (b).

Judgment for the plaintiff (c).

(a) But see *Barnard*. 432.

(b) That, as against a wrong-doer, it is sufficient to declare on possession; see *Birt v. Stode*, 12 Mod. 97; *Comb.* 370; and *Skin.* 621.

(c) The cause was afterwards tried upon the general issue, and after a long hearing the plaintiff was nonsuited. This gave rise to the question in *Barnes* 136.

respecting the costs. In *Barnes* 138. it is said that there was a difference of opinion among the Judges respecting that determination: in Mr. J. *Abney's* MS. it appears that the whole Court of King's Bench and one of the Barons were against that decision. Vide *Duberley v. Page*, 2 D. & E. 391.

1746, 7.

Saturday,
Feb. 7th.

RICHARDS qui tam v. DOVEY Clerk.

A custom that every man inhabiting in the parish of A. who marries by license in another parish shall pay 5s. to the rector of A. for and in regard of the said marriage as if it had been solemnized in A., is bad.

THE defendant, the Reverend R. Dovey Clerk, libelled the plaintiff in the Consistorial Court of *Litchfield* and *Conventry*, for a fee of 5s. on his marriage. The plaintiff moved for a prohibition, and having declared the defendant in order to have a consultation, pleaded the following custom on which he had insisted below; "That within the parish of *Saint Martin* in *Birmingham* in the county of *Warwick* there is and from time whereof &c. there hath been a certain ancient custom used and approved of, to wit, that every man being a parishioner inhabitant or resident of or within the said parish of *Saint Martin* that hath married or taken to wife or married or taketh to wife a woman either residing or inhabiting within the said parish or within any other parish, and procureth and hath the said marriage solemnized between him and her the said woman by virtue of a license in any other church chapel or place and not in the said church of *Saint Martin*, hath for all the time aforesaid constantly paid and ought to pay to the rector of the rectory of the said parish church of *Saint Martin* for the time being the sum of five shillings of lawful money of *Great Britain* for and in regard of the said marriage, as if the same had been actually had and solemnized in the said parish church of *Saint Martin*."

To this plea there was a general demurrer, and joinder in demurrer.

Beotle Serjt. for the plaintiff. The custom pleaded is unreasonable and void. 2 *Lutw.* 1059. *Thompson v. Davenport*. No fees are due for christening or burying unless by custom, and even then the duty must be performed. *Bourdeaux v. Dr. Lancaster*, *Salk.* 322. And in the case of *Naylor qui tam v. Scott*, 2 *Ld. Raym.* 1558. it was holden that a custom that a person should pay the churching fee, though the ceremony was not performed, was void.

Leeds Serjt. for the defendant. This custom may have a reasonable commencement. All marriages were originally by publishing banns;

banns; and licenses were introduced by the 103d canon as a dispensation with banns. Some fee was always due for marriage. The office of matrimony directs that the usual fee shall be laid down on the book.

1746, 7.

RICHARDS
against
DOVEY.

Willes Lord Ch. J. was of opinion that the custom as pleaded was void; but should have doubted if it had been pleaded to be due as coming in lieu of the fee due on publishing banns which are dispensed with by license.

Abney J. Matrimony is a sacrament, 1 *Gibbs*. 431 (a), and therefore no fee ought to be paid for it. *Lindwood* 678. And he referred to *Anderson v. Walker*, *Lutw.* 1030; *Topsall v. Ferrers*, *Hob.* 175; and *Burdeaux v. Dr. Lancaster*, case in *W.* 3d's time (b) 171. *Salk.* 332; and the Dean and Chapter of *Exeter's* case, *Salk.* 334.

Burnett J. and *Birch* J. of the same opinion.

Per Curiam

Judgment for the plaintiff.

(a) The words of the canon are, "Firmiter inhibemus ne cuiquam pro aliquâ pecuniâ denegetur sepultura, vel baptismus, vel aliquod sacramentum ec-

clesiasticum, vel etiam matrimonium contrahendum impediatur."

(b) 12 *Mod.* 171.

JAMES AUSTIN against K. WHITTRED.

T. 21 G. 2.

Monday,
June 29th.

"TRESPASS. The plaintiff declares that the defendant on the 3d of September 1745 at Cambridge took and carried away nine cheeses, one pair of scales, one scale beam, and one triangle belonging to the said beam, of the plaintiff's, value 10 *l.*, and converted and disposed thereof to his own use. Damage 40 *l.*

Every person has of common right a liberty of carrying his goods to a public fair for sale; and consequently goods cannot be distrained, damage feasant, by the owner of the soil and fair.

The defendant pleads two justifications, after having pleaded not guilty to all the trespass except taking and carrying away the cheeses &c; first, that the town of Cambridge with the liberties thereof at the said time when &c was and time out of mind

1747.

AUSTIN

against

WHITE

TREA.

mind hath been an ancient town and borough; and that there is and at the said time when &c was and time out of mind hath been a certain ancient fair of right holden and kept at *Barnwell* and *Sturbridge* in the said county within the liberties of the said town and borough yearly and every year on the feast of *Saint Bartholomew* the Apostle and from thence continually until the 14th day next after the feast of the *Exaltation of the Holy Cross* for the buying and selling of any kind of goods and merchandizes in the same fair, together with all and all manner of jurisdictions authorities courts profits of courts free customs tolls dockages pickages stallages booths groundages advantages commodities profits easements and other liberties whatsoever to the same fair belonging, of which said fair and other the premises thereunto belonging as aforesaid (except certain liberties jurisdictions &c to the chancellor master and scholars of the university of *Cambridge* in the same town of *Cambridge* belonging, and by them of old time had used and enjoyed) and also of the sole and separate use of the ground and soil of the places at *Barnwell* and *Sturbridge* where the said fair is and hath been and ought to be held as aforesaid for and during all the respective times of holding the said fair for pickage stallage and groundage there and all other uses and purposes of the said fair the mayor bailiffs and burgesses of the said town of *Cambridge* at the said time when &c and long before were and still are seised in their demesne as of fee. And the said defendant further saith that the said mayor bailiffs and burgesses being so seised of the said fair with the appurtenances and of the said soil as before mentioned on the feast of *Saint Bartholomew* the Apostle in the year 1745 and from thence continually until the 14th day after the *Exaltation of the Holy Cross* in the same year the said fair of the said mayor bailiffs and burgesses was holden and kept at *Barnwell* and *Sturbridge* aforesaid within the liberties of the said town and borough for the buying and selling of any kind of goods and merchandizes in the same fair; and because the said cheeses &c at the said time when &c being in and during the time of the said fair were wrongfully put and placed in and upon the ground and soil of the said mayor bailiffs and burgesses called *Sturbridge Fair*, to wit, where the said fair was so held as last aforesaid and within the liberties aforesaid incum-

bering the said ground and soil, and doing damage to the said mayor bailiffs and burgeses in the use of their said soil there, the said *K. Whittred* as servant of the said mayor bailiffs and burgeses and by their command at the said time when &c in and during the time of holding the said fair *took and seised the said cheeses &c so doing damage there for and in the name of a distress for the said damages* so done and doing to them, and carried away the same, as it was lawful for them to do, and so justifies the doing it.

1747.

AUSTIN
against
WHIT-
TRED.

To this the plaintiff replied; and in his replication insisted that he was a cheesemonger, and that at the time when &c he brought the cheese into the said fair and put and placed the same in and upon the said ground and soil of the said mayor &c called *Sturbridge Fair* in the said fair there so held as aforesaid to expose to sale and to sell the same there in the said fair, and did then and there expose to sale the said cheese on the said ground and soil in the said fair there, and that the said scales, beam, and triangle, being the necessary utensils and implements of the said trade and business of the said plaintiff for the weighing of the said cheese so exposed to sale there when sold to the buyers thereof were also then and there brought along with the said cheese for that purpose by the plaintiff and put and placed along with the said cheese in and upon the said ground and soil of the said fair there for that purpose, as it was lawful for him to do; and that the defendant of his own wrong took seised and carried away the said cheese so exposed to sale in the said ground and soil in the said fair there, and the said pair of scales &c, then and there in the said fair found; and this he is ready to verify, wherefore he prays judgment &c.

The defendant, by his rejoinder, confesses the fact to be as set forth in the plaintiff's replication, but insists that the plaintiff put and placed the said cheese upon the said ground and soil in the said fair there for the purpose in the said replication mentioned without the license consent or agreement of the said mayor &c for this purpose had and obtained, and against the will of the said mayor &c, therewith incumbering the said ground and soil in the said fair there, and doing damage

1747.

AUSTIN
against
WHIT-
TRED.

to the said mayor &c in the use and enjoyment of the said soil there, as the said defendant hath before alleged; and this he is ready to verify, wherefore he prays judgment &c.

To this rejoinder the plaintiff demurs generally, and the defendant joins in demurrer.

The second plea is something different from the first; and an issue being joined upon an immaterial part of it, viz., whether the place where the said cheese &c was put was part of the ground within the said fair commonly called the Cheese Fair, which issue was sent down to trial, and a verdict was found for the plaintiff, who affirmed that it was on part of the ground called the Cheese Fair, this second plea is quite out of the case.

But it comes on now before the Court upon the plaintiff's demurrer to the defendant's rejoinder on the first plea.

And several objections (a) were taken to this plea of the defendant;

1st, To the form of the plea;

2dly, To the substance.

First, to the form, 1st, That the defendant had not set forth a right to the soil in the persons under whom he justifies, but only a right to an easement or privilege in the soil, and therefore could not distrain for damage done to the soil, because they could not have an action of trespass (b) but only an action on the case.

(a) This case was twice argued; the first time in the *Easter* term preceding by *Booth* Serjt. for the plaintiff and *Draper* Serjt. for the defendant, and again on this day by *Wynne* Serjt. for the former and *Prime King's* Serjt. for the latter.

(b) But as those under whom the defendant justified were entitled to the sole and separate use of the ground and soil

of the place where the fair was holden during the fair, *quære* if they might not have maintained *trespass* against any person who committed a trespass on the ground. Vid. 2 *Roll. Abr.* 549. *H. pl.* 1; *Dyer* 285. *b. pl.* 40; *Wilson v. Mackreth*, 3 *Burr.* 1824; and *Burt v. Moore*, 5 *D. & E.* 329.

2dly,

2dly, That the defendant has not shewn when their right commenced, nor under what title they claim it.

1747.

AUSTIN
against
WHIT-
TRED.

3dly, That if this were not generally necessary where persons plead that they are seised in fee, yet that it is necessary in this particular case, because the right which they insist on is laid to be a prescriptive right, and therefore as they do not say that they had it by prescription, or time out of mind, but only say that at the time when &c and long before were and still are seised of this right, they ought to set forth when and by what grant or title such right was vested in them.

The objection to the plea in point of substance was, that the defendant having admitted that the place where &c was part of the place where the fair was held, every one has a right to come there to sell his goods, and consequently to lay them upon the ground in order to expose them to sale as necessarily incident to such right; and as it admitted by the demurrer that the cheeses were put there to be exposed to sale, and that the pair of scales and other things were necessary for weighing and selling the cheese and put there for that purpose, the defendant had a right to place them there, and consequently could not be distrained as damage feasant.

As to the objections to the form of the plea, *The Court* gave no positive opinion, but thought that the defendant might have set forth his case better; that he ought to have set forth the title of the mayor &c more particularly as they claimed a prescriptive right; and that they might have shewn more fully that they were owners of the ground and soil. But we thought that these defects were aided either by the plaintiff in his replication saying and admitting that he put and placed his cheese &c in and upon the ground and soil of the mayor &c, or by his replying over to the defendant's plea without insisting on these defects by a special demurrer, but gave no positive opinion whether they would have been fatal defects if he had so done. Besides, it was insisted on by the defendant (which was of some weight) that a person may distrain things damage feasant even though
he

1747.
AUSTIN
against
WHIT-
TRED.

he be not owner of the soil, but has only an easement or profit out of it; and the instance of a commoner was mentioned which was certainly true.

But not being quite agreed in our opinions in respect to the objections to the form of the plea, we gave no positive opinion about them, being all clearly of opinion that the plea was bad in substance (a)."

(a) This account, which appears to have been written by the Chief Justice in one of his note-books after the case was determined, finishes abruptly, the reasons which induced the Court to decide that the plea was bad in substance not being added. But it clearly appears from a short note on the back of his Lordship's paper-book, written in court, that the grounds of decision were those mentioned by Mr. J. Abney in giving his opinion. "Abney J. The defendant in this record passes over all customary payments, and puts his case merely on a right to distrain goods, as damage feasant, that were legally placed in the fair. Now I admit that every thing that is damage feasant is distrainable: but the cheese was not damage feasant, and therefore the distress was unlawful. By the common law no toll is due for things brought to the fair unless sold, and then the buyer is to pay it: but by special custom, it is true, a man shall pay for his place, namely, his

standing, though he sell nothing. *Bro. Abr.* "toll," *pl.* 2; *Sir T. Jon.* 227. A pitching 1d. for every hundred of cheese exposed to sale in a market. But admitting that in this case the plaintiff could not pitch or ground his goods without a reasonable satisfaction, it would yet be against the defendant; for this is not a distress for groundage; and if it had, if the sum had been certain, it ought to have appeared that the Court might judge whether or not it were a reasonable sum. That goods (1) brought to a fair to be sold are exempted from distress, the cases of *Launceston*, *Cro. Eliz.* 75, *Leadenhall Market*, *ib.* 628, and 2 *Ld. Raym.* 1589. clearly prove. And I do not know any judicial authority or even obiter opinion against them. It is absurd to say that the goods were legally placed there, and eo instanti were doing damage. 8 *Co.* 146 (2). *The Six Carpenters' case*. An hostler cannot distrain my horse damage feasant; for I have a right of entry."—MS. Abney J.

(1) But though every person has of common right a liberty of bringing his goods to a fair or market for sale, he has no right to erect stalls, or to bring tables, there for the purpose of exposing his goods thereon to sale: and if he erect the one, or bring the other, without the consent of the owner of the soil, he subjects himself to an action of trespass. *The Mayor &c of Northampton v. Ward*, 2 *Str.* 1238, and 1 *Wils.* 107; and *The Mayor &c of Norwich v. Savann*, 2 *Bl. Rep.* 1116.—See the case of *The Clerk of the Trustees of Taunton Market v. Kimberley*, 2 *Bl. Rep.* 1120.

(2) Second resolution there.

1747.

FULLER *qui tam* against SAY Clerk.M. 21 G. 2.
Mond. y.
Nov. 16. h.

IN a prohibition tried at the *Lent* assizes at *Thetford*, in *Norfolk*, before Mr. J. *Abney*, a special case was reserved for the opinion of the Court of Common Pleas.

A custom that every inhabitant of a parish of the age of 16 (of whatever religious sect) shall pay 4d. yearly as an Easter offering, is good.

It stated that within the parish of *Swaffham* there is and from time whereof the memory of man is not to the contrary there hath been a certain ancient and laudable custom used and approved within the same, that is to say, that every married man inhabiting and residing within the said parish of *Swaffham* with his wife, such married man and his wife respectively being of the age of 16 years or older, hath paid and been used and accustomed to pay and yet of right ought to pay for himself and his wife to the vicar of the vicarage of the parish church of *Swaffham* for the time being yearly at the feast of *Easter* or so soon after as the same has been demanded four-pence as for and in the name of *Easter* offerings. That at *Easter* 1745 and long before *Fuller* and his wife inhabited and resided within the parish of *Swaffham*, and were respectively of the age of 16. That the plaintiff and his wife were *Quakers*; and that neither of them ever went to the church of *Swaffham*, or ever received the sacrament or communion with or from the defendant, the vicar of *Swaffham*; and that neither the plaintiff or his wife ever participated of or personally attended upon any of the offices of the church. And the question was whether the defendant was entitled to a writ of consultation.

This case was argued by *Leeds* Serjt. for the plaintiff, and *Bellfield* Serjt. for the defendant.

For the plaintiff it was contended that this *Easter* offering was in the nature of a fee for administering the sacrament, and that as the duty was not performed the fee was not due. 2 *Lutw.* 1010. *Lindw. lib.* 1. tit. 2.; and *lib.* 3. tit. 16. *Selden's Titbes*, c. 4. *Spelm. de non tenendis Ecclesiasticis*, f. 6. c. 4. *Spelm. c.* 4; *Godolp. Repert. Canon.* 441; *Fox's Acts and Monuments*, vol. 3. p. 10; the rubrick at the end of the communion

7 X

service,

1747.
 FULLER
 qui tam
 against
 SAY.

service; *Stillington's Ecclesiast. Cases*, 1 vol. 292; *Gibbs*. 340; *Archbishop Sedbury*, 469; stat. 37 Hen. 8. c. 12. f. 12. *Watf. Clerg. Law*, c. 52. That this custom was too general, because it claimed the fee from those who do not, as well as from those who do, receive the sacrament. And that it was void, because it does not except those persons who are excepted by stat. 1 W. & M. c. 18. f. 1.; and Quakers are there exempted, they being at liberty to attend their own places of religious worship. And the case of *Richards q. t. v. Dovey (a)* Clerk was cited to shew that this custom was unreasonable.

For the defendant, it was argued that the defendant was entitled to these fees under the custom from a consideration, 1st, negatively of what *Easter* offerings were not, and 2dly, affirmatively of what they were. 1st, That they were not sacramentary, nor paid on account of the administration of the sacrament; Dr. *Ayliffe's Par. Juris Canonici*, fo. 195. 2dly, That they were formerly voluntary offerings, but were now due by custom in some parishes, and are only called *Easter* offerings because payable at *Easter*; Dr. *Ayliffe's Par.* 60; 392, 3; stat. 27 H. 8. c. 20; 32 H. 8. c. 7. f. 2.; 2 & 3 Ed. 6. c. 13. f. 7. 10 (b); 1 W. & M. c. 18. f. 6 (c); 2 *Inst.* 659. That the custom was established by the verdict; and that the voluntary absence of the parishioners could not excuse them from paying the duty. And that the toleration act saved the rights to the parsons &c.

Upon this argument each of the Judges expressed a strong opinion in favor of the defendant.

Willes Lord Ch. J. said that the custom was found by the verdict; that it did not appear to him to be either illegal or unreasonable; that by the rubrick, "every parishioner is to

(a) *H. 20 G. 2. supra*, 621.

(b) Which enacts that all and every person and persons who by the laws or customs of the realm ought to pay their offerings shall yearly pay them to the parson &c at such four offering days as at any time theretofore within the space of four years last past had been used and accustomed for the payment of the same,

and in default thereof to pay for their said offerings at *Easter*.

(c) By the sixth clause of the toleration act it is enacted that nothing therein contained shall exempt any persons from paying tithes or other parochial duties, or any other duties to the church or minister.

communicate at least three times in the year, of which *Easter* shall be one; and yearly at *Easter* every parishioner is to reckon with the parson vicar or curate and pay to him or them all ecclesiastical duties accustomedly due there and at that time to be paid;" and that the defendant's right was expressly saved by the stat. 1 W. & M. c. 18. s. 6.

1747.

FULLER
qui tam
against
SAY.

But "this being a matter that concerned so great a body of men as the Quakers, though the Court had very little doubt, at the earnest desire of the plaintiff they ordered it to be spoken to again next term. Afterwards however, in the next week, several of the Quakers came into court, and said that upon consideration and consulting with their counsel they did not desire to hear it spoken to again, but were willing that the Court should give judgment this term."

Accordingly on the last day of this term the Lord Chief Justice delivered the opinion of the Court (a) in favour of the defendant, and a writ of consultation was awarded.

(a) The reasons of the Court as delivered by the Chief Justice do not appear: but the separate opinions of the three other Judges given on the first argument were thus given according to Mr. J. Abney's MS.

"Abney J. It seems to me very difficult to give an exact historical account what *Easter* offerings were or for what they were due. However to avoid the great uncertainty the stat. 2 & 3 Ed. 6. was made, by which a clear rule is laid down for the guide of the parson vicar and parishioners. Gibson (p. 738.) says they were a kind of composition for the oblation due on certain solemn occasions; and (fo. 740.) partly a composition for the holy loaf, which the communicants used to bring and offer, and which, as Dr. Gibson says, is to be answered at *Easter*, because by the rubrick every parishioner at that great festival was bound to communicate. It is plain that he knows not what to make of them. What has the holy loaf to do with the wafer? They rather seem to me to be in the nature of a personal tithe, which by stat. 2 & 3 Ed. 6.

c. 13. s. 10. was to be paid at *Easter*. The stat. 13 Ed. 1. ft. 4. c. 1. de circumspete agatis treats of them as mere spiritual things, and gives the cognizance of them to the spiritual court only. It seems originally to have been a voluntary or free gift either at marriage, purification, now vulgarly called churching of women, or at burials; and so is *Linwood*, lib. 3. de Decimis et Oblationibus fo. 185; and when in money, a penny, halfpenny, or farthing, or any other thing. But the Popish clergy were so angry at any attempt to fix a certain sum that in 3 Ed. 3. a constitution was made that whosoever attempts to fix the sum shall be excommunicated with the greater excommunication; it being the constant aim of the *Romish* clergy to get all they could of the deluded laity. But this occasioned such a variation in the oblations that it produced the stat. 2 & 3 Ed. 6. c. 13. s. 10., a reasonable and wise provision; which enacts that all persons who by the laws or customs of the realm ought to pay offerings shall yearly pay the same at the four usual offering days or

at

1747.
FULLER
qui tam
against
SAR.

at the feast of *Easter* (1). This statute made parochial custom the rule and guide, and put an end to the canons and constitution.

By the rubrick 5 & 6 *Ed. 6.* Every man and woman is to pay to the curate the due and accustomed offerings.

Rubrick 13 & 14 *Car. 2.* Yearly at *Easter* every parishioner shall reckon with the parson, vicar, or curate, or his or their deputy or deputies, and pay to him or them all ecclesiastical duties accustomedly due. The stat. 7 & 8 *W. 3. c. 6.* gives two justices of the peace jurisdiction over oblations and offerings; and the statute 3 & 4 *An. c. 18.* makes it a perpetual law. By the rubrick at the communion, if there be no oblation or alms then the priest shall say &c.

But it is said that the plaintiff is a Quaker, and as such is exempted: but how does the exception appear? For

1st, The custom found is general, every married man.

2dly, The canon is general, all persons.

3dly, The stat. *Ed. 3.* is general, all persons.

4thly, The rubrick *Ed. 6.* is every man and woman.

5thly, The rubrick 13 & 14 *Car. 2.* is every parishioner.

The statute 1 *W. & M. c. 18. s. 6.*, that most excellent and Christian law, has these words, "nothing in this act shall exempt any persons from payment of tithes or other parochial duties or any other duties to the church or minister."

From all which I conclude that a consultation ought to go. And I confess I saved this case at the assizes not from any difficulty I was then in, but because it concerned great numbers of parochial clergy and so considerable and loyal a body of the subjects as the Quakers are.

Burnett J. The toleration act, which was an act of great indulgence to Protestant Dissenters, would be a mean of destroying the established church, if the not participating of the sacrament would be an exemption from the payment of tithes or other duties. But the service of the church is for the advantage and benefit of all the parishioners. The toleration act has excused Quakers from attendance but not from payment.

Birch J. The demand is founded on the stat. 2 & 3 *Ed. 6.*; and I see no color of exemption in any law by being a Quaker."—MS. *Abney J.*

(1) See also *Doctor Leifell v. Tyfdale*, *Hob. 10, 11*; and *Carthew v. Edwards*, *Ambl. 72.*

M. 21 G. 2.
Saturday,
Nov. 21st.

To a plea of tender plaintiff replied a demand and refusal before suing out the writ; rejoinder that before suing out the writ he tendered &c, traversing that at any time after the tender and before suing out the writ plaintiff requested him to pay &c.—Rejoinder held bad on demurrer. In a plea of tender defendant must say he was always ready to pay: ready from the time of the tender is not sufficient.

HALDENBY v. TUKE.

ASSUMPSIT for work and labor &c. There were four counts in the declaration; and in each the sum of 3 *l.* 18 *s.* 10 *d.* was claimed.

Plea, non assumpsit as to three last counts; and as to the 3 *l.* 18 *s.* 10 *d.* in the first (a) a tender in the common form.

Replication, that after the making of the said first promise and undertaking

(a) The practice formerly was to he may plead a tender to the whole, plead the tender to one count only: but if he please; though he cannot plead non assumpsit

undertaking &c. and before the suing out of the said original writ of the plaintiff to wit on the 29th of April 1747 the plaintiff requested the defendant to pay him the said 3*l.* 18*s.* 10*d.*, and the defendant then and there wholly refused to pay &c; and this he is ready to verify.

1747.
HALDENBY
against
Tuke.

Rejoinder, that before the suing out of the original writ the defendant tendered and offered to pay to the plaintiff the sum of 3*l.* 18*s.* 10*d.*, as by the said plea he hath above alleged, without this that the plaintiff at any time after the tender and before the suing out of the original writ of the plaintiff requested him to pay &c.

To this the plaintiff demurred, and shewed for cause that by the rejoinder the defendant traversed matter not alleged in the replication, and that the rejoinder was no answer to the replication, but totally immaterial &c.

Poole Serjt., for the plaintiff, argued that it was not necessary to allege that the demand and refusal were after the tender. That if there were a refusal before, the plaintiff had received damages. And he cited *Giles v. Hart*, Salk. 622; and 1 *Ld. Raym.* 254, and *Sweatland v. Squire*, Salk. 623 (a) to shew that "always ready from the time of tender is not a good plea to assumpsit."

Agar Serjt. for the defendant. The plaintiff ought to have said that the demand was after the tender. Here was a tender of the whole that was due to him. And he cited a case in this court, *Burdus v. Keilborn*, Tr. 19 & 20 G. 2. The replication has not admitted or denied the plea. After the tender the plaintiff ought to have demanded damages.

Poole Serjt. in reply. The plaintiff in his replication denied the material part of the plea, namely, that the defendant

assumpsit as to the whole, and a tender as to part, *Maclellan v. Howard*, 4 D. & E. 194. And therefore the usual mode now is to plead non-assumpsit as to the whole, except such a sum, and a tender of that sum. (a) *Whitlock v. Squire*, 10 Mod. 81. S. P.

1747.
 HALDENBY
 against
 TOKE.

was always ready to pay. The traverse in the rejoinder is of matter which is not alleged in the replication: besides the plaintiff is entitled to damages for the demand and refusal.

Willes Lord Ch. J. was of opinion that the rejoinder was bad, and the replication good.

Abney J. *Semper paratus* (a) is of the essence of a plea of tender.

Burnett J. Damages may be recovered for non-payment on the first demand.

Birch J. Agreed on both points.

Judgment for the plaintiff (b).

(a) The defendant must also say that he tendered and offered to pay, *French v. Watson*, 2 Will. 74.

(b) *Vld. Douglas v. Patrick*, 3 D. & E. 683.

M. 21 G. 2.
 Tuesday,
 Nov. 24th.

An action to recover a penalty under the stat. 5 & 6 Ed. 6. c. 14. must be brought in the county where the fact was committed, and not commenced in the superior courts at Westminster.

JEFFERY *qui tam* against COLES.

TO an action of debt, brought on the stat. 5 & 6 Ed. 6. c. 14. against regrators, forestallers and ingrossers (a), the defendant pleaded nil debet; and on the trial at the assizes in *Somersetshire* a verdict was found for the plaintiff, subject to the opinion of the Court of Common Pleas on the following case.

The defendant on the 11th of March 1745 at *Bridgwater* in the county of *Somerset* bought six weather sheep alive of the price of 3*l.* 18*s.*, and on the 25th of March 1746 sold the same sheep alive at *Axbridge* in the said county, contrary to the statute. And the question reserved was whether the action was well brought in the Court of Common Pleas at *Westminster*, charging the offence to have been done and committed (as in truth it was) within the county of *Somerset*, or whether the defendant ought to have been charged therewith in any other

(a) This statute has been since repealed by stat. 12 Geo. 3. c. 71.

manner

manner or by any other suit or prosecution commenced and laid within the said county of Somerset only and not elsewhere, pursuant to the stat. 21 Jac. 1. c. 4.

After two arguments at the bar on the 2d of July and the 24th of November 1747 by Bellfield Serjt. for the plaintiff and Draper Serjt. for the defendant,

The Court gave their opinion in favor of the defendant, and ordered a

Judgment (a) of nonsuit to be entered up.

(a) The reasons given by the Court do not appear among the Lord Chief Justice's papers: but the following is Mr. J. Abney's account of this case—"And after consideration of a great number of cases cited, The Court were of opinion that the action was not maintainable in the superior court, unless the fact had been committed in Middlesex, being grounded on a statute precedent to 21 Jac. 1. c. 4. which has restrictive and negative words in it. And the true rule is that in all penal laws antecedent to stat. 21 Jac. 1. where the justices of assize and superior courts at Westminster had a concurrent jurisdiction (1) the suit must be com-

menced before justices of assize and sessions, and not before the justices at Westminster. For though the statute 21 Jac. gives no new jurisdiction to inferior justices, yet it in terms takes away the jurisdiction of the courts at Westminster. But in suits on those statutes that give debt &c. and mention not justices of assize or peace, they must be brought in the superior courts, otherwise there would be a defect of remedy. By this resolution the seeming contradictions in the cases are reconciled, many of which treat of this in a very loose manner." MS. Abney J.

(1) But by these words must be understood "a concurrent jurisdiction both as to the subject matter and as to the mode of proceeding." And therefore where the stat. 1 Jac. 1. c. 22. inflicted certain penalties to be recovered (sect. 46.) by action of debt or information in the courts at Westminster, and (by section 50) gave jurisdiction to the justices of assize, of gaol delivery, and of the peace, "to inquire of the premises and to hear or determine the same", as under the latter clause the inferior courts could only proceed by indictment or presentment, it was holden that the informer might bring an action of debt in the court at Westminster for a penalty incurred in Surry, notwithstanding the stat. 21 Jac. 1. c. 4., otherwise the penalty could not be removed at all. *Shipman qui tam v. Henbest*, 4 D. & E. 109. See also *Farrington v. Keymer*, Cro. Car. 112; *Hutt*, 98; *Hicks's case*, Salk. 372; and *Smith v. Potter*, 1 Str. 415.

1747.

JEFFERY
qui tam
against
COLES.

1748, 9.

Hilary G. 2.
February 3d.

Parish officers
levying a
a poor rate
under a war-
rant of dis-
tress may re-
tain of the
goods sold
the necessary
expences of
the dis-
tress and sale.
Barnes 459.
S. C.

MOYSE *against* COCKSEGE and Another.

TRESSPASS for breaking and entering the plaintiff's house and taking the plaintiff's goods. Plea not guilty. On the trial at the assizes at *Bury* in *March* 1747 a verdict was taken for the plaintiff with 1 s. damages, subject to the opinion of the Court on a case reserved.

The plaintiff the occupier of an house was rated 5 s. 3 d. in the poor rate, and on her refusal to pay, a warrant of distress was granted by two justices to the defendants, overseers, to levy of the plaintiff's goods; under which the defendants distrained the goods in question, kept them five days, then caused them to be duly appraised by a sworn appraiser, and sold them for 10 s., that being the best price that could be got for them. The defendants paid the appraiser 1 s. for his trouble in viewing and appraising the goods; and afterwards tendered to the plaintiff 3 s. 9 d. part of 10 s. which she refused to accept; insisting that she ought to have 4 s. 9 d., 5 s. 3 d. only having been applied towards the poor rate.

The questions were, 1st, Whether the defendants ought to have tendered the plaintiff 4 s. 9 d. as the overplus; and 2dly, If they ought, whether *this action* were maintainable.

Prime King's Serjt. for the plaintiff argued, 1st, That the officers were not authorised by the stat. 43 *Eliz. c. 2.* to levy more than the sum assessed; no charges or expences being allowed by the act, as is the case in those acts of parliament where the Legislature intended to allow the charges of distress and sale; 13 *Eliz. c. 13. s. 5*; 2 *W. & M. c. 5. s. 2*; and 3 & 4 *W. & M. c. 12.* 2dly, That trespass was the proper action; for that where the law gives a license to do a particular thing and the party exceeds it, he is a trespasser ab initio, 8 *Co.* 146; 1 *Ventr.* 36, 37. *Gro. Eliz.* 783; 1 *Rol. Abr.* 673; and 6 *Mod.* 216.

Draper Serjt., for the defendants, insisted that the power of distress

distress and sale given by the statute of *Elizabeth* also included the expences necessarily attendant on that distress and sale; otherwise the parish, for whose benefit the distress was given, might be damnified instead of receiving a benefit from it by expending more money in enforcing payment than the sum unpaid amounted to. But 2dly, That at all events the action was misconceived, because the defendants, if they were in the wrong had not been guilty of a misfeazance, but of a nonfeazance only in not paying the money over to the plaintiff, for which trespass would not lie. *The Six Carpenters' case*, 8 Co. 146. That in 1 *Ld. Raym.* 188. it was holden that an action of trespass will not lie for a nonfeazance. That the proper remedy in this case was an action of debt or assumpsit.

1748, 9.

MOYSE

against

COCKSEDOE
&c.

Prime Serjt. in reply mentioned the cases in 1 *Rol. Rep.* 76; and *Noy* 17.

The Court gave judgment for the defendants (a).

(a) "The Court were clearly of opinion, 1st, That the 1 s. for the costs might be legally and reasonably detained by the overseers, the sum not appearing oppressive or extravagant. That a distress under the stat. 43 *Eliz.* was to be considered not as a distress at common law, which is a pledge and deposit, but as it was saleable that it was in the nature of an execution, and that the necessary expences were incidental. That statutes made in favor of charity ought to have a benign and large interpretation, *Yelv.* 176. Nay that the stat. 43 *Eliz.* gave power to imprison even for a penny; and who is to be at the expence? That it would be absurd that a parishioner who refused to

pay 6d., should put the parish to the expence of 40s. to levy it.

2dly, That in this case the action was misconceived; for here was no irregularity committed according to the stat. 17 *Geo. 2. c. 38*; no misfeazance. And a bare nonfeazance will not make a man a trespasser. That that statute was made in favor of officers; and if the plaintiff had any right to the 1 s., it must be in the nature of a debt, for which assumpsit will lie and not trespass (1). *The Six Carpenters' case*, 8 Co. 146. is material. A sheriff, who levies money on a just execution and does not pay it over, is no trespasser, 1 *Ld. Raym.* 188. Judgment for the defendants *per totam Curiam.*"
MS. *Abney J.*

(1) *Presly v. Dawkins*, H. 11 W. 3. Bull. N. P. 45. S. P.

1750.

M. 24 G. 2.
Friday,
Nov. 23d.

WILLIAM ELLIS *against* WILLIAM ROWLES and
RICHARD WYEMAN.

[T. 21 GEO. 2. Rol. 1722, 3, & 4.]

Defendant in a plea justified taking cattle *damage feasant*, and afterwards rejoined that they were taken *sur-charging* the common; held to be a departure. — If a commoner, having right of common for one beast, put on two, the lord can only distrain the one put on last unless they were both turned on together; and it must be shewn in a plea (justifying the taking as a *sur-charge*) whether they were put on together or separately, and if the latter which was put on first.

TRESPASS for taking and impounding the plaintiff's cattle, to wit, one bullock and one ox.

As to all the trespasses &c except taking the ox the defendants pleaded the general issue; and as to the ox they pleaded specially, that the Duke of *Newcastle* and others (naming them) were seised in fee of the manor of *Longney* with the appurtenances in the county of *Gloucester*, of which *Grainger's Moor* is part, and because the ox was feeding and doing damage there the defendants as servants of the Duke of *Newcastle* &c by their command took the said ox in the name of a distress and impounded him.

The plaintiff replied that he was seised in fee of a messuage and twelve acres of land with the appurtenances in the parish of *Longney*, and prescribed for a right of common in *Grainger's Moor* for two cows or for one ox and one yearling beast at his election yearly upon and from the *Monday* next after the third day of *May* until *Midsummer-day* then next following as to his messuage and lands with the appurtenances belonging; and then he stated that being so seised &c on *Monday* next after the third day of *May* in the 19th year of the reign &c he put one ox into the said place &c to use his said common there, which said ox was so using his said common there from thence until the defendants of their own wrong afterwards and before *Midsummer-day* then next following, to wit, on the 6th of *May* in the said year took and impounded the said ox &c.

Rejoinder, (admitting the right of common stated in the replication,) that the plaintiff before the said time when &c and at the said time when &c had of his own wrong in the said place &c two oxen, to wit, the ox in the declaration mentioned and one other ox; that the said two oxen at the said time when &c were

were in the said place &c feeding on the grafs there then growing, whereby the plaintiff at the said time when &c had overcharged the said common with the said ox in the declaration mentioned; and because the said ox in the declaration mentioned at the said time when &c was in the said place &c feeding &c and furcharging the common there and doing damage there as aforesaid, the defendants as servants of the Duke of *Newcastle* &c (leaving the said other ox of the plaintiff in and upon the said place &c which he of right ought to have and depasture there in right of his said messuage and lands with the appurtenances as aforesaid to use his said common of pasture at the said time when &c) took the said ox in the declaration mentioned in the said place &c so feeding on the grafs there then growing and furcharging the said common there and doing damage in the said place &c in the name of a distress for the said damage there then done and doing by the said ox, and impounded &c.

1750.
ELLIS
against
ROWLES.

To this there was a *Surrejoinder*, in which the plaintiff claimed a right of common on *Grainger's Moor* for two oxen: but as the surrejoinder was abandoned by the plaintiff's counsel in the course of the arguments, it is not given here.

The defendants demurred generally to the surrejoinder.

This case was first argued on the 6th of *June* 1749 by *Draper* Serjt. for the plaintiff and by *Bootle* Serjt. for the defendants, and now by *Bellfield* Serjt. for the former and *Willes* King's Serjt. for the latter.

Two objections were taken to the rejoinder by the plaintiff's counsel; 1st, That it was a departure from the plea; that the defendants in their plea relied on the damage feasant and in their rejoinder on a surcharge of common, which did not fortify the matter contained in, but was a departure from, the plea; *Co. Lit.* 304. a; *Doctr. Plac.* 124. "Departure"; and that the defendants might have pleaded the surcharge of common at first. 2dly, That it did not appear by the rejoinder that the defendants had a right to distrain *this* ox; for that as it was admitted on the record that the plaintiff had a right to put one ox on the

1750.

ELLIS
against
ROWLES.

common the defendants ought to have alleged that the plaintiff first put on one ox and afterwards the ox in question, and that they distrained the latter as a surcharge, unless they were both turned on together; but that at all events it ought to have been stated one way or the other, either that they were turned on together or that the one was put on first and then the other and that the second was taken as a distress, for the lord has not his election to take which of the two he pleases unless both were put on together.

In answer to these objections it was urged, 1st, That new matter may be inserted in a rejoinder if it support the plea, and that the matter disclosed in this rejoinder did support and fortify the plea. *Dixon v. James*, 2 *Lutw.* 1238. 2dly, That it was not necessary for the defendants to shew which of the two oxen was first turned on, it being a sufficient justification in the lords in taking the distress that there were two oxen on the common instead of one; and that it was difficult for the lords to prove which was first turned on.

But *The Court* (Lord Chief Justice *Willes* and *Burnett* and *Birch* Justices, Mr. Justice *Gundry* being absent) were of opinion that both the objections were well founded. First, that the rejoinder was a departure from the plea; for that there was a great deal of difference between damage feasant and a surcharge of common. That the surcharge might have been pleaded at first, *Salk.* 221., because the defendants then knew the plaintiff's right, in which respect this case was different from that cited from *Lutwyche*. Secondly, That it ought to have been stated in the rejoinder whether the oxen were turned on the common together or separately, and if the latter which of the two was first turned on; and that it did not now appear whether or not the defendants were justified in distraining the ox in question (a). And they gave

Judgment for the plaintiff.

(a) But it does not appear that either of these objections was taken in a subsequent case, *Hall v. Harding and Others*, *E. 9 Geo. 3. B. R. 4 Burr.* 2426; and *1 Bl. Rep.* 673. There in replevin for

taking the plaintiff's sheep on *Whitmanslie Down* the defendant avowed taking the cattle doing damage to his right of common; the plaintiff in his plea in bar claimed a right of common for himself, as tenant

tenant of eight acres of land, for two sheep for every acre; the defendant (admitting the right of common claimed by the plaintiff) replied that at the time of the distress the plaintiff had sixteen sheep on the common over and above the sixteen that were distrained, that the defendant left the first mentioned sixteen to use the common and only distrained the supernu-

merary sixteen with which the plaintiff had overcharged it of his own wrong and which were doing damage to the plaintiff; and the only question made was whether one commoner can distrain the cattle of another commoner who had surcharged beyond his stinted number, which was determined in the negative; and the plaintiff had judgment.

1750.

ELLIS
against
ROWLES.

CHARLES POLE *against* GEORGE FITZGERALD;
in Error.

[Hil. 22 GEO. 2. B. R. Rol. 82.]

E. 25 Geo. 2.
Friday,
May 8th.
Exchequer
Chamber.

THIS case came by writ of error from the Court of King's Bench into the Exchequer-Chamber, where (after two arguments by *Sewell* and *Henley* for the plaintiff in error, and by *Hume Campbell* and *Ford* for the defendant in error) the unanimous opinion of the latter Court was now delivered, as follows, by

Willes, Lord Chief Justice, C. B. "It is a very great concern to me that I differ in opinion from the four Judges of the King's Bench, for all of whom I have the greatest respect: but my concern is the less, as I am supported in my opinion by seven other Judges, for whom likewise I have a very great regard.

Before I deliver our opinion, in order to come at the point in question it will be necessary to state the pleadings and the special verdict on which the question arises, which I will do as shortly as I can.

The action was brought in the Court of King's Bench by *G. Fitzgerald* against *C. Pole* on a policy of assurance underwritten by the defendant for 100*l.* on a ship or vessel called *The Goodfellow Privateer*, and the plaintiff laid his case three ways. The cause was tried at the Sittings held for the city of *London*, and a verdict was found for the defendant on the second and third counts, so they are now quite out of the case. But a special verdict was found on the first count, and on that only the present question arises. The policy of assurance is set

Insurance on a ship (a privateer) at and from Jamaica to any ports &c at sea or shore, cruising for four months, without further account &c and free from average, (before stat. 19 Geo. 2. c. 37.) the insured had interest in the ship to the amount insured; during the four months the crew mutinied, brought the ship by force into Jamaica, and having carried away the arms &c deserted her, by which the further cruise was prevented: as the ship was in safety in her proper port at the end of the four months, held that the assured could not recover.

1752.

Pole
against
FITZ-
GERALD;
in Error.

forth verbatim in that count, but I will only state such parts of it as are material to the point in question.

The insurance was made on the 31st of *August* 1744 on the body tackle apparel ordnance munition artillery boat and other furniture of and *in the ship or vessel* called the *Goodfellow Privateer*, whereof *P. Joyce* was master, or whoever else should go as master, *lost or not lost*, from *Jamaica* to any ports and places whatsoever at sea or shore a cruising from port to ports and place to places for and during the space of four calendar months, beginning the adventure *on the said ship &c* from and immediately following the 14th day of *June* then last, and to continue and endure *until the said ship* with all her tackle apparel &c should arrive at any ports and places where and whatsoever or cruising from port to ports and place to places for and during the space of four calendar months, commencing as aforesaid; *the said ship &c* for so much as concerned the assured was and should be valued (one half part of the said ship) at 1000*l.* without further account to be given by the assured for the same.

The perils, against which the insurance was made, were the usual perils which are specified in policies of this sort, and it will not be material particularly to mention them. But it is material to take notice that they are all of them said in the policy to be such as had or should come to the hurt detriment or damage of *the ship &c.*

The money insured by the defendant was 100*l.* The premium he received was twenty guineas; and in case of loss the assured was to abate 2*l.* per cent; and the assurers were to be *free from all average.* These I think are all the parts of the policy that at all relate to the matter in dispute.

It is averred in the declaration that the insurance so made by the plaintiff was made for and on account of and in trust for and for the use and benefit of *P. Joyce*, and that the interest which the said *P. Joyce* had at the time of making the said insurance and during the said cruise *in the said ship* amounted to a large sum of money to wit to 2000*l.* and upwards; and that

the said ship on the said 14th of *June* being at *Jamaica* in good safety set sail and departed from thence in and upon her said intended voyage a-cruising, and that being so cruising there was a mutiny in the ship on the 23d of *September* following, and that against the will of the master and officers of the ship she was seized taken restrained and detained by the greatest part of the mariners then on board her and the command taken from the master, and she was not permitted to proceed on her voyage a-cruising any longer, but was carried back again to *Jamaica* on the 30th of the same *September*, and there the said mariners ran away from the said ship with the boats belonging to her and totally quitted and deserted her, so that she could not and did not perform her said voyage a-cruising during the said four months, but from the time of her being so seized and detained during the residue of the said four months was totally disabled to perform her said voyage, and thereby the owners and proprietors of the said ship totally lost all benefit and advantage which might have accrued to them in and from the said cruise during the residue of the said four months; and therefore the plaintiff demands 98*l.* by virtue of the policy.

The special verdict finds the policy just as it is set forth in the declaration, and that the defendant *Pole* underwrote 100*l.* on the 31st of *August* 1744. It finds likewise that the ship was safe at *Jamaica* on the 14th of *June* 1744, and sailed from thence on a cruise, and was an *English* privateer duly commissioned by the Admiralty here; and that during the said cruise there was a war between *Great Britain* and the Kings of *France* and *Spain*; and that on the 10th of *July* the said ship in her cruise took a *French* ship of the value of 4200*l.* and made prize thereof. That on the 31st of *August* *P. Joyce* the captain fell ill, and was obliged to quit the ship with the consent of all the crew; and that *John Hussy* the first lieutenant was by the consent of the captain and all the mariners appointed commander thereof, and that the said ship was sailing on her cruise from a port called *The River of Doggs* to fetch water, and within the said four months, to wit, on the 23d of *September* 1744 the crew of the ship mutinied against their commander and officers and by force carried her against their will back towards *Jamaica* and before her arrival in port there seized the boat fire arms and cutlasses

1752.

POLE
against
FITZ-
GERALD;
in Error.

1752.
POLE
against
FITZ-
GERALD;
in Error.

cutlasses belonging to the said ship, and carried off the same, and deserted the said ship, by which the cruise was totally prevented and lost for the remainder of the said four months from the said 23d of *September*. It is further found that the ship on the 29th of *September* 1744 arrived at *Jamaica*, and was there in good safety, at and after the end of the said four months, but was prevented by the said mutiny and desertion from further pursuing her said cruise. It is likewise found that the insurance was made for the account of *P. Joyce* the owner and captain of the said ship, and that he during all the time of the said cruise had interest in the said ship to the amount of the sum insured. And on these facts the jury submitted the point in question to the judgment of the Court of King's Bench, who have given judgment for the plaintiff.

Upon this special verdict two questions arise,

1st, Whether this were an insurance on the voyage, or only an insurance on the ship;

2dly, Even taking it for granted that this was an insurance on the voyage, whether the plaintiff can recover in this action.

The first is the principal question, and that which was chiefly litigated by the counsel; the second was but just hinted at. And therefore I shall speak more fully to the first, and likewise for this reason, that if we determine that one way, there is undoubtedly an end of the matter in dispute; for if this were not an insurance on the voyage, but on the ship only, it is not pretended that the plaintiff can recover in this action. For as the policy is made *free from average*, in that case to entitle the plaintiff to recover, there must be a total loss of the ship: whereas it is expressly found that the ship was in safety at *Jamaica* at and after the end of the four months.

And as to the first point, we are all of opinion that the insurance was not on the voyage but on the ship, for the following reasons;

1st, Because it is contrary to the nature of an insurance to construe this to be an insurance on the voyage.

2dly,

2dly, Because from every part of this policy it plainly appears to have been the intent of the parties that the insurance should be only on the ship.

3dly, Because if this policy were to be construed otherwise, great absurdities and inconveniences would ensue.

And lastly I shall consider all the cases that were cited which are any ways material to the point in question, and shall shew that none of them are authorities for the plaintiff, but that several of them are express authorities for the defendant.

First; The construction contended for by the plaintiff is contrary to the nature and the original design of insurances. They were at first invented for the benefit of trade, that if a merchant miscarried in one voyage he might not be ruined for ever, but by giving premiums to other persons to insure either his ship or his goods, the loss (if it happened) might be divided amongst them, and so the merchant might be enabled to try his fortune in another voyage. So that insurances were contracts of indemnity and not for profit or gain. It were endless to cite books to this purpose, but I will mention two very celebrated authors, *Roccus de Affecutionibus*, and Monsieur *Clericoe* in his treatise called *Guidon*, who define an insurance in this manner. The first says "Affecutio est contractus quo quis alienæ rei periculum in se suscipit, obligando se sub certo pretio ad eam compensandam si perierit." The other is in *French*, but I chuse rather to put it into *English*, "An insurance is a contract, by which there is an indemnity of things transported by sea from one country to another." These definitions plainly shew that the nature of an insurance is as I have before mentioned. And therefore by the laws of most foreign countries insurances were to be made only on part of the ship or goods, and they were not allowed to be good in any foreign country (nor here till of late years) if they exceeded the whole value of the ship or cargo. But indeed of late in *England* two other methods of insurance have been introduced, of *interest or no interest*, and of *valued policies*, which are little better than wagers. But even of this sort I never before heard of any insurance *on a voyage*. And these sorts of policies have been found so far from being for the advantage of trade, that they have been very detrimental to it, and productive of great frauds, and therefore they are

8 B

declared

1752.

POLL
against
FITZ-
GERALD;
in Error.

1752.
 POL
 AGAINST
 FITZ-
 GERALD;
 In Error.

declared to be void by the stat. 19 Geo. 2. c. 37. I do not mention that statute as extending to the present case, because this policy was made before that statute. But I mention it to shew that these sorts of policies ought not to be favored, or extended beyond the express words of them; and there is no exception in the statute, which is material to the present case; for though there is an exception in respect to privateers, it is only of insurances made on the ships themselves.

Secondly, in the next place, I think it plainly appears from the words of the present policy that it was the intent of the parties to insure only *the ship* with its appurtenances, and that they never thought of insuring the voyage. This insurance is said to be *on the ship &c.* The perils specified in the policy are confined to such as may happen to *the ship &c.* The ship &c. is valued at such a sum. And I should think that even at the time of bringing this action the plaintiff and his advisers never imagined that the voyage was insured, because he has not averred in any part of his declaration that the person for whom the insurance was made was any ways interested in *the voyage*, but only that he had an interest in *the ship*. But this was (I suppose) an after-thought, founded upon a mistake in the resolution in the case of *Pond v. King*, of which I shall take notice by and by: and upon this foot it was insisted that, it being mentioned in the policy that the ship was to go on a cruising voyage for four months, the cruise and the voyage were the thing insured. But it is (I think) very plain and clear that these words, which were so much relied on by the plaintiff, were inserted in the policy for other reasons, and that they will not bear such a construction as is contended for by the plaintiff. The time was inserted for the benefit of the insurer, that he might not be obliged to make good the loss of the ship unless it happened within that time. And the mentioning that the ship might cruise or sail to or from any place or places within that period of time was inserted both for the sake of the insured and the insurer; for the sake of the insured, to prevent the insurer insisting on a deviation; and for the sake of the insurer, that the ship might not be employed in any service but cruising. For an insurer cannot know what premium to insist on, unless he knows on what service the ship is to be employed, whether on a more or less dangerous voyage; if therefore this ship had been employed during the

four months on any other service but cruising, to be sure in case of loss the insurer would not have been liable. To shew the absurdity of the notion, that this expression of *cruising* shews that the insurance was on the voyage, I beg leave to put only one case, which is too plain to be disputed. Suppose a man insures on a ship to carry tobacco from any place to *London*, she must carry tobacco, because if she might carry other things she might be in greater danger of being lost: but if by reason of a storm, or for any other reason, the tobacco be thrown overboard and lost, but the ship comes safe to *London*, was it ever thought that the insurance on the ship was to be paid? And yet this is exactly a parallel case with the present.

1752.

POLE
against
FITZ-
GERALD;
In Error.

Thirdly, What I have already said shews that the notion of an insurance on a voyage is absurd: but I will in the next place mention several other absurdities and inconveniences that would ensue if this construction should prevail. In the first place it would be a double insurance, both on the ship and the voyage; for if the ship were lost before the end of the four months to be sure the voyage is lost; and if the voyage be lost, according to the plaintiff's construction, though the ship (as in the present case) be in good safety at the end of the four months, yet the insurance must be forfeited. In the next place if the loss must be total, then if the ship be safe but one day or one hour during the four months the insurance will not be forfeited. On the other hand, if it may be partial, as to be sure an insurance for four months may be divisible into parts, a worse absurdity will follow; for though the ship in the first part of the voyage should take a prize of never so great a value, yet if she be prevented pursuing her voyage but one day at the last, the insurer must pay the money insured, which would be very absurd and unjust. And yet that is the present case; for it is found by the verdict that this ship took a prize in the beginning of her voyage of above double her value. There would likewise be another great absurdity and inconvenience; for it is certain that the only difference between these *valued policies* and *policies on interest* or *no interest* is this, that in one case the insured is not obliged to prove the quantum of his interest, and in the other he is not obliged to prove any interest at all: but in all other respects these and other policies are the same, and must be determined and construed in the same manner; and so it was expressly held by the

1752.
 Pole
 against
 Finch
 GERALD;
 In Error.

the Court of Common Pleas in the case of *De Paiba* and *Ludlow* (a). Now if this were a policy without either of these clauses, and the insurance were upon the voyage, how is it possible to prove what the loss is? for a ship in a voyage of four months may take a prize of a million value, or she may take no prize at all, or she may in that time be taken or lost herself; it is impossible therefore that such a contingency can ever be valued. From these observations it plainly appears what nonsensical sorts of things these insurances on voyages are: and if it were necessary to give my opinion upon them, I should think (according to my present sentiments) that if a policy were to be so drawn as that a voyage were insured by express words, such a policy would be void, both as illegal and unreasonable.

I come now, in the last place, briefly to take notice of several of the cases (b) which were cited by the counsel. The case of *Pond v. King* (c), which was determined in *B. R. H. 21 Geo. 2.*, besides that it is a very modern case, is as different from the present as possible. For though the words of the insurance are pretty much the same as the present, the ship there was totally lost, she having been taken by the *French*. And though she was retaken, and ordered to be restored to the owners on the payment of salvage, yet they never thought proper to pay the salvage, so never had the ship; and they certainly had their election, and were in the right to do so. For as by the terms of the policy the insurers were not to pay any salvage, if the owners had paid it, they must have paid it out of their own pockets, and would thereby have lost their claim on the insurers; they thought it therefore most for their interest to abandon the ship, and to sue the insurers for the money insured. So that we can determine the present case for the defendant without at all shaking the authority of *Pond v. King*. The case of *De Paiba v. Ludlow* in the Court of Common Pleas, 5 Geo. 1., which was strongly relied on in the present case, and (as I am informed)

(a) *Cam. Rep.* 360.

(b) All the cases on this subject, both prior and subsequent, are collected by Mr. Park in his admirable treatise on *The Law of Marine Insurances*.

(c) 1 *Will.* 191. The report of this case in *Will.* is accurate, except in one

particular; the clause at the end of the policy was this; "In case the ship should not be heard of in twelve months after the expiration of the said three months, the assurers agree to pay the loss; the assured to repay the money in case the ship should be afterwards heard of in safety."

was much insisted on likewise in the case of *Pond v. King*, is no authority at all for the plaintiff, it having been determined on quite another point; for there the question, which was so much litigated, and which occasioned so much doubt with the Court, was whether the ship were lost or not, the property not being altered by the capture. But it was never once mentioned or imagined that the insurance was on the voyage; if it had, the other point need never have come in question. For there was no doubt but that the voyage was lost by the capture, whether the ship were considered as lost or not. That case therefore is rather an authority for the defendant, as it shews that the Court and counsel at that time had no notion of an insurance on a voyage. The cases of *Green v. Young*, 2 Lord Raym. 840, *Trantor v. Watson*, 6 Mod. 12, and an anonymous case in *Salk.* 444, were determined upon other points; and not a word was said in any of them of an insurance on a voyage. There was indeed a nisi prius case of *Berkley v. Cullen* cited and said to have been tried at *Guildhall* before Lord Chief Justice *Lee*, in which it was said that the Lord Chief Justice delivered his opinion, that though the ship were alive, the policy was forfeited, because the voyage was lost: but that case might certainly have been determined on another point; for the ship there was seized for his Majesty's use and turned into a hulk, and the owners never had her again before the end of the voyage; so that the ship was certainly to be considered as lost. And there is another nisi prius case, of which I have a report, which was tried in the King's Bench at the Sittings after *Trinity* term 1749, where though the insurance was for a month on a cruise, and the ship was taken by the *French* and detained for some time, so that the voyage was lost, yet as the *French* afterwards quitted her, and she came back safe to *Dartmouth* within the month, the jury (as I am informed) found a verdict for the defendant; and I never heard that the Judge found fault with the verdict, or that there ever was any motion to set it aside.

Having said so much on the first head, and it being I think very clear that this was an insurance only on the ship, and not on the voyage, I shall say but very little on the second point, that if this were an insurance on the voyage yet that the plaintiff could not have judgment. And this is so very plain, that I think it cannot admit of a dispute; for it is certain that in

1752.

Pole
against
Fitz-
Gerald;
In Error.

1752.

POLE
against
FITZ-
GERALD;
In Error.

valued policies the insured must shew that he had some interest in the thing insured, though he need not prove the quantum of his interest. Now in the present case it is only found that *P. Joyce*, the person on whose account the insurance was made, was *interested in the ship*, but it is not found that he had any interest *in the voyage*; nor could it be so found, since it is not so much as averred in the declaration. Now upon a special verdict no fact can be presumed, nay it must be presumed that there was no such fact proved, since a special verdict cannot find a negative (*a*). It is certain, and it has been a common case, that the owner of a ship has let his ship out to cruise as a privateer only at a certain rate, without having any share in the contingent profits of the voyage. And if the case were so, there was the more reason why he should insure his ship at a high rate, as such an enterprise is a very hazardous service, and the ship is in great danger of being taken or lost.

Therefore for both these reasons, we are all of opinion that the judgment of the Court of King's Bench must be reversed (*b*)."

(*a*) Vid. *Martin v. Jenkin*, 2 Str. 1144; and 1 Wils. 57.

(*b*) This case was afterwards carried up to the House of Lords, where this judgment of the Exchequer-Chamber was (on

the 1st of March 1754) affirmed; eight of the Judges were for affirming, three for reversing it, and Mr. J. Burnett who died before judgment was actually given coincided with the eight.

M. 26 Geo. 2.
Nov. 15th.

THOMAS JENKINS on the Demise of JAMES PROSSER
otherwise JENKINS against MARTHA JENKINS.

[Hil. 24 GEO. 2. Rol. 794]

A. gave an annuity to B. for her life, to be paid to her out of certain lands by his executor; and then devised those lands to C. and appointed C. his executor: held that C. took an estate at least during the lifetime of the annuitant.

Qu. If he did not take an estate in fee?

ON the trial of this ejectment for lands at *Yarkhill* and *West-bide* in the county of *Hereford*, a special verdict was found, from which these facts are taken.

On the 22d of July 1729 *John Jenkins*, being seised in fee of the premises in question, by will, after giving several pecuniary legacies, gave "to *Mary Harper* 5*l.* a-year to be paid

to her out of the premises in question by his executor as long as she should live, and to be paid quarterly"; and he gave to *John Jenkins* son of his brother *David Jenkins*, "all his lands goods and chattels with his money out upon bills and bonds," and appointed him sole executor. After the devisor's death, to wit, on the 2d of *May* 1730 *John Jenkins* the devisee entered, and on the 1st of *July* 1750 died leaving *John Jenkins* his eldest son, and several other children. The premises in question are of the yearly value of 16*l*. *James Prosser*, otherwise *Jenkins*, is the heir at law of the devisor; and the defendant is the tenant of *John Jenkins* the son of the devisee.

1752.
T. JENKINS
dem. J. JEN-
KINS
against
M. JENKINS;

After two arguments at the bar by *Prime* (a) and *Willes* (b) King's Serjeants for the plaintiff, and *Poole* and *Wynne* Serjeants for the defendant, the opinion (c) of the Court was delivered by

Willes, Lord Chief Justice. (After stating the special verdict.) "The question is whether the executor, *John Jenkins*, took a larger estate by the will of the devisor *John Jenkins*, or only an estate for life, in the premises in question. If he took an estate for his own life only, he being dead the lessor of the plaintiff as heir at law to the testator is entitled: if he took a larger estate, it must be either an estate in fee or an estate during the life of the annuitant; and be it which it will, as the annuitant is still living (d), the lessor of the plaintiff cannot recover.

Three rules were laid down and agreed by the counsel on both sides, by which it was said this case was to be determined;

1st, That an heir at law shall not be disinherited but by express words, necessary implication, or manifest intent;

2dly, That every devise must be considered as intended to be beneficial to the devisee;

3dly, That every devisee, who is to pay any thing out of an estate, must have such an interest in the estate as will enable him

(a) On the 31st of *January* 1752.

(b) On the 15th of *November* 1752.

(c) It does not appear on what day the judgment of the Court was delivered: but it was after the 15th of *November*.

(d) It did not appear on the special verdict whether the annuitant were living or

dead: but the defendant's counsel insisted (and that argument was now adopted by the Court) that as the plaintiff could not recover during the lifetime of the annuitant, the Court could not presume her death on a special verdict.

1752.

T. JENKINS
 dem. J. JEN-
 KINS
 against
 M. JENKINS.

to pay it, otherwise the intention of the deviser will be frustrated. And we agree that these are all right rules.

If therefore it be not the plain intention of the deviser, appearing on the face of the will, that the executor should have a larger estate, we should have been of opinion that the executor would only have had an estate for life. But we are of opinion that it plainly appears that the deviser intended to give him a larger estate.

As to the second rule, we do not much rely on that, for as in this case the executor is to pay the annuity of 5 $\frac{1}{2}$ out of the estate, and as the estate is found to be worth 16 $\frac{1}{2}$ a-year, he cannot in any case be a loser. But we found our opinion on this, that, as the annuity is to be paid by the executor and to be paid out of the estate, the intent of the deviser cannot take place, unless the executor has at least such an estate in the lands devised as will last as long as the annuity is payable. Whether he has an estate for the life of the annuitant only, or in fee, we need not determine in this action, because the annuitant is alive: but we are rather inclined to think that he took an estate in fee, because there is no one case where a devisee by virtue of the word "paying" has been adjudged to have a larger estate than for his own life, in which it has not also been adjudged that he took an estate in fee (a).

There are so many cases upon this head, most of which were cited upon the argument of this case, that make for the defendant, and the matter has been so often determined, and is now so well settled, that I shall only just mention the names of some of these cases, and shall state only one case particularly which was cited on the part of the plaintiff in order to lay it out of the way, because we think that it is no authority at all in the present case. The case I mean is that of *Ausley v. Chapman*,

(a) See *Doe d. Beezley v. Woodhouse*, 4 D. & E. 89. There the deviser gave his real and personal estates to his wife for life, and directed part of the personalty to be sold after his wife's death, and divided between five persons; he then gave two annuities to A. and B. to be paid by his executor out of his whole estate, and to com-

mence after his wife's death; and he then devised "the remainder of the profits, after his wife's death and after the yearly payments to the annuitants, out of his whole estate, to C. D. and E. equally, share and share alike:" and it was holden that the executor took a fee.

reported

reported in *Cro. Car.* 157, but more fully by the name of *Amesley v. Chapman*, in *Sir W. Jon.* 211. There a man devised several estates to his five sons, without saying what estate they should have in them, but directed that they should bear part and part alike and pay out of his houses and lands devised to them to his wife 40*l.* a-year during her life, which he was bound to pay as appeared by indenture, covenant, and obligation; and it was holden that they took only estates for life, because the 40*l.* a-year was charged on the lands before, and the estate could not be discharged by his will, and into whose hands soever the estates fell they must be charged with this annuity; and that the will only contained directions to the sons in what manner they were to pay it whilst they enjoyed their several estates in the land.

1752.

T. JENKINS
dem. J. JEN-
KINS
against
M. JENKINS.

The cases on the other side are so numerous that it would be but mispending time to go minutely through them in so plain a case as this is: but I will just mention the names of some (a) of the principal cases. *Collier's case*, 6 Co. 16; and *Cro. Eliz.* 378; *Spicer v. Spicer*, *Cro. Jac.* 527; *Willock v. Hammond*, 3 Co. 20, 21; *Greeve v. Dewel*, *Cro. Jac.* 599; *Weble v. Hearing*, *ib.* 415, 416; *Lee v. Withers*, *Sir T. Jon.* 107, and *Pollexf.* 539; *Read v. Hatton*, 2 Mod. 25; and *Freak v. Lea*, 2 Lev. 249; the two last of which are very strong authorities in point, but I think that the present case is so very plain that it does not want them.

It was said for the plaintiff that, if the executor had died in the lifetime of the devisor, this annuity would have been a lapsed legacy, which shews that it was no charge on the estate, but must die with the executor: whether this would have been so or not, it will be time enough to determine when such a case comes before us. But we think it is a circumstance not material in the present case.

Another matter directly contrary to this was likewise insisted on for the plaintiff, that this was a charge on the estate, and therefore would remain a charge on it in the hands of the heir after the executor's death. But I think otherwise, because it is

(a) See also *Moore d. Fagge v. Heafeman*, *Hil.* 12 Geo. 2. sup. 140, 141. and the cases there referred to.

1752.

T. JENKINS
dem. J. JEN-
KINS
against
M. JENKINS.

directed to be paid *by the executor*; and because, if so, the annuitant would have no remedy against the heir for a breach of the condition: he has a remedy against the executor and his heirs for a breach of the condition, and the heir may enter for the benefit of the annuitant. But if it be considered as a condition annexed to the estate of the heir, no one can enter on the heir for the condition broken; and if they are construed as words of limitation, it will be exactly the same thing, because the estate is not limited over to any other person.

As to the observation, that it is only said to be paid *by the executor*, and *his heirs* are not mentioned, we think that of no weight; for saying that his executor is to pay it is only descriptio personæ, and is just the same as if he had said to be paid by *John Jenkins*.

For these reasons we are all of opinion that judgment must be for the defendant."

H. 26 Geo. 2.
Wednesday,
Feb. 12th.

DRAKE v. WIGLESWORTH.

[Hil. 23 GEO. 2. Rol. 630, 631.]

A custom, that all the householders in the parish of A. shall grind all their corn which shall be used by them ground within the parish, is good: but a custom that they shall grind all their corn used or sold is bad. Such an obligation on an occupier of one of such houses is not extinguished by one of our Kings having been formerly

THIS was an action on the case, in which the plaintiff (amongst other counts) declared that on the first of *August* 1747 and before he was and from thence hitherto had been and still was lawfully possessed of and in a certain ancient (a) water corn-mill called *Barnoldswick Mill* with the appurtenances situate and being in the parish of *Barnoldswick* in the county of *York*, and by reason thereof had and ought to have for all the time of his possession as aforesaid toll of all corn ground in the said mill, and that all householders and occupiers of dwelling-houses within the parish of *Barnoldswick* aforesaid during all the time of the said plaintiff's possession of the said mill with the appurtenances of right ought to have ground and still of right ought to grind at the said mill all their corn after the grinding thereof used and expended in their respective houses and to pay to the plaintiff for the grinding thereof a

seised in fee of such house and of the mill at the same time.

Qu. If it would not have been extinguished by the King's having inhabited such house?

(a) It is not necessary to state that it is an ancient mill. *Coryton v. Litheby*, 22 Saund. 112.

reasonable

1752, 3.

DRAKE
against
WIGLES-
WORTH.

reasonable toll; that the defendant was on the day and year aforesaid and still was an householder occupying a certain dwelling-house in the parish of *Barnoldswick*, and had for all the time aforesaid inhabited in the said dwelling-house, nevertheless that he (the defendant) knowing the premises &c but designing to injure the plaintiff and to deprive him of the profit and advantage which of right ought to have accrued to him for the grinding of the corn of the said defendant by him after the grinding thereof, within the time aforesaid used and expended in his house on the 1st of *August* in the said year and on other days and times &c at *Barnoldswick* aforesaid withdrew his grist from the said mill and ground and caused to be ground a great quantity of his corn, that is to say, 1000 bushels of wheat &c by him after the grinding thereof in his said house within the time aforesaid used and expended in and at other mills, to wit, at *Barnoldswick* aforesaid; by reason whereof the plaintiff had totally lost the profit and advantage which he might and ought to have got and obtained for the grinding thereof at his said mill.

To this the defendant pleaded the general issue.

On the trial the plaintiff proved a custom time immemorial for all the householders and occupiers of dwelling-houses within the parish of *Barnoldswick* to grind at the plaintiff's mill all their corn after the grinding thereof used and expended in their respective houses, and to pay to the owner or tenant of the mill for the time being for the grinding thereof a reasonable toll. That the defendant during the time mentioned in the declaration was an householder, occupying a certain dwelling-house in the parish of *Barnoldswick*, and during the time in the said declaration mentioned had withdrawn his grist from the plaintiff's mill. The defendant did not controvert the usage proved on the part of the plaintiff, but gave in evidence certain ancient deeds, by which it appeared that King *James* the First became and was at one and the same time *seised in his demesne as of fee*, in right of his crown, as well of the said mill as of the said messuage which the defendant occupied during the time mentioned in the declaration.

It was insisted on the behalf of the defendant that this unity of possession in the crown destroyed the right claimed by the plaintiff

1752, 3.

DRAKE
against
WIGLES-
WORTH.

plaintiff to bind the defendant by custom to grind at his mill; whereupon a verdict by consent was found for the plaintiff, subject to the opinion of this Court upon this question,

Whether there was any unity of possession which had destroyed the plaintiff's cause of action?

The case was twice argued, the first time on the 6th of May 1751 by *Poole* Serjt. for the plaintiff, and by *Bootle* Serjt. for the defendant, and the second time by *Willes* Serjt. for the former and *Prime* Serjt. for the latter. And now

Willes Ch. J. delivered the opinion of the Court, as follows, after stating the case.

"Two questions have been argued, though one only is made in the case;

1st, Whether or not the custom be good;

2dly, Whether it has been destroyed by unity of possession.

First; This is exactly the same custom as is stated in *Higges v. Gardener* in 1 *Rol. Abr.* 559, pl. 4. It is a good custom that a person and all those &c have been seised of a mill time out of mind, and that all the inhabitants within the parish ought to grind all their corn which they expend in their messuages or tenements at the said mill; and this is good, though all the inhabitants are not his tenants; for this custom might have a reasonable commencement by agreement at the erection of the mill. The same case is in 2 *Bulstr.* 195; and there it is said that this was undoubtedly good by way of tenure, and *a fortiori* by prescription and custom it may be so; and Lord Ch. J. *Cook* said that a writ de secta ad molendinum lies where it is by custom as well as where it is by tenure. And he said that though it might have a reasonable commencement, yet it might be difficult to shew it (a); and though no reason can be given for the beginning of this or any other

(a) See *Cockfedge v. Fanshawe*, Dougl. 132. oct. ed.

custom yet *non sequitur* that the custom is unreasonable and against reason at the beginning of it; for for some things no reason can be given; and *per Curiam*, the custom is good. As to the beginning of customs, it was said by Lord Coke in *Gateward's* case (a) (speaking of the difference between prescriptions and customs), "Every prescription ought to have by common indentment a lawful beginning, but otherwise it is of a custom; for that ought to be reasonable, et ex certâ causâ rationabili (as *Littleton* saith) usitata, but need not be intended to have a lawful beginning, as custom to have land devisable, or of the nature of gavelkind, or *Borough-English* &c." In *Harbin v. Grene, Moor* 887 (b), the custom was only holden to be bad, because it was laid that they were to grind all their corn *which they sold* as well as what they consumed in their houses.

1752, 3.
DRAKE
against
WIGLES-
WORTH.

As to the objection, that it cannot be extinguished, for which was cited 6 Co. 59. *Gateward's* case; that is only said of a right of common, but not of other rights.

I admit that there must be a mutual consideration; and in this case, to be sure, if a man is obliged to grind at a mill, the owner of the mill must keep it in order with all necessities. And if this declaration had been in the old way on the custom this must have been set forth, otherwise on a demurrer the declaration would have been held bad: but this action being on the possession only, it need not be set forth in the declaration, but the custom must be proved at the trial, and enough proved to shew that it was a good subsisting custom, otherwise the plaintiff could not have had a verdict: but we must take it that it was so proved here, because it is so stated in the case. We are therefore of opinion that this is a good custom (c).

As to the second question whether on the state of the case there was any unity of possession that destroyed the plaintiff's right, we are of opinion that there is not.

(a) 6 Co. 60. b.

(b) *Hob.* 189. S. C.

(c) See *Cort v. Birkbeck*, *Dougl.* 218.

oct. ed.

1752, 3.

DRAKE
against
WIGLES-
WORTH.

We are not quite agreed whether the word *seisin* implies *possession*: but if it does, we think it does not destroy the custom; because we take it to be a custom, not annexed to the estate, but, personal, to the inhabitancy. And therefore taking it for granted that *seisin* implies *possession*, it does not imply *inhabitancy*; and if the King did not inhabit the house (which is not stated, and it cannot be presumed that he did,) it is not such an unity as will affect the present case.

It is plain that this is not annexed to the house; for if so, none but ancient houses could be affected by the custom: but the custom is clearly not confined to *ancient* houses, for if a man live in a new-built house, he is bound to grind his corn there; I think therefore this is not improperly called *lex loci*. This has been compared to a right of common and a way: but I think it is not like either, because common is a profit out of the land, a way is an easement; and a man cannot have an easement in his own land, nor have the whole of the profits and part. And yet some rights of common have been holden not to be extinguished; as it is said in many of our old law-books that common appendant is not extinguished, though of late it has been holden otherwise (a). And some rights of way are not, as a way to a church or a Market; it was so held in 1 *Rol. Abr.* 936. pl. 10 & 13; 6 *Co. Gateward's* case; 3 *Bulstr.* 339, *Shury v. Pigot*, and in the same case reported in *Poph.* 166. That was the case of a watercourse; and it was holden in both cases that the right to a watercourse is not destroyed by unity of possession, 1st, because it is natural, and 2dly, because of the necessity. And this case much more resembles the case of a watercourse and a way to a church than the cases of commons and general rights of way.

We are therefore of opinion that this right is not destroyed by any unity of possession stated in the present case, and that therefore the plaintiff must have his judgment."

(a) *Vid.* 4 *Co.* 38. a.

1752, 3.

EDWARD BARKER and JAMES COOKE *against* THOMAS
Bishop of LONDON, CALEB LOMAX, and DANIEL
BELLAMY Clerk.

Hil. (a) 26
Geo. 2.

[Tr. 24 GEO. 2. Roll from 781 to 796.]

THIS was a quare impedit brought by the two plaintiffs jointly; but *Cooke* was summoned and seivered; and then *Barker*, an infant, by his next friend *E. Radcliffe*, declared alone.

The count deduced a title to the advowson from the reign of *Charles* the Second to *H. Killigrew* in 1693; and then stated that *H. Killigrew*, being seised in fee of the advowson, on the 8th of *December* 1704 by will devised to his wife *Lucy* for life, and died in *December* 1712; whereby *Lucy* his widow became seised of the advowson in gross as of freehold for the term of her life, and the reversion descended to *Lucy*, *Mary*, and *Judith Killigrew*, the daughters and coheiresses of *J. Killigrew*, whereby they became seised of the reversion in gross as of fee in coparcenary. That on the 8th of *August* 1716, *Lucy's* (the daughter's) third part of the advowson was settled, subject to the widow's life-estate, on *James Cooke* on his marriage with *Lucy Killigrew* for his life, remainder to the wife for life, with divers remainders over. That on the 3d of *February* 1726 *Mary Killigrew* married *E. Barker* (the father of the plaintiff), whereby *E. Barker* and *Mary* his wife in right of the said *Mary* became seised of *Mary's* third part of the advowson. That during the life of *Lucy*, the widow, on the 1st of *October* 1728, the church became vacant by the death of *E. Fothergill* the then incumbent, whereupon one *Caleb Lomax*, usurping on the title of *Lucy* the widow, presented *J. Romney* who was admitted, instituted, and inducted. That on the 10th of *September* 1729, *Lucy*, the widow, died. That on the 8th of *June* 1730 the church became vacant by the resignation of *J. Romney*, whereupon the King, usurping on the title of *J. Cooke*, *E. Barker* (the father), and *Mary* his wife, and *Judith Killigrew*, presented the said

If A. and B., coparceners of an advowson, do not agree to present on a vacancy, A. the eldest (or her assigns) may present to the first turn, and B. or her assigns to the next.

—And if, when A. and B. do not agree, C. (a stranger) implead A. only by quare impedit on a vacancy and recover, it is a bar to a quare impedit brought by B. against C. for that turn, though not for the next turn.
1 H. Bl. 412.
S. C.

(a) It does not distinctly appear on what day the judgment was given, but it was after the 7th of *February* 1752, when the last argument was heard.

J. Romney,

1752, 3.

BARKER
against
LOMAX.

J. Romney, who was admitted instituted and inducted. That on the 10th of *May 1731* *Judith Killigrew* by will devised her third part to trustees, in trust for her sister *Mary Barker* for her life to and for her separate use, remainder to *E. Barker* (the plaintiff) in tail, with remainders over, and died on the 18th of *June 1731*. That on the 1st of *May 1734* *Mary Barker* died, leaving *E. Barker* (the plaintiff) her only son, upon whose decease *E. Barker* (the plaintiff) became seised as of fee-tail in the third part, which had originally belonged to *Judith Killigrew*. That afterwards the church became vacant by the death of *J. Romney*, and still continues vacant, whereby it belonged to *James Cooke*, *E. Barker* (the father), and *E. Barker* (the plaintiff) to present &c. That on the 28th of *November 1747*, during the vacancy, *E. Barker* (the father) died, on whose death *E. Barker* (the plaintiff) became and was seised in gross as of fee-tail of and in the third part of the advowson, which was the father's (*E. Barker's*); whereupon it belongs to *James Cooke* and *E. Barker* (the plaintiff) to present &c, but that the defendants will not permit them, but unjustly hinder them &c.

The bishop only claimed the admission institution and induction of vicars to this church.

The two other defendants severally pleaded four pleas; but the third is the only one to which there was a demurrer.

The defendant *Lomax*, in his third plea, stated that in *Michaelmas* term in the 20th year of the reign of *George the Second* he the defendant (then being under the age of twenty-one years) by *M. Lomax* his next friend impleaded *Edmund* then bishop of *London*, and one *D. Cresspin* Clerk, *James Cooke* one of the plaintiffs in this cause, and *Edward Barker* (the father of the other plaintiff), in this court by a writ of quare impedit &c; that *Edward Barker* (the father) died pending the said plea; and thereupon such proceedings were had against the three other defendants that he (*Lomax* the defendant in this cause) in *Hilary* term in the twenty-first year of the reign by the consideration of this Court recovered against *James Cooke* his presentation to this vicarage, by default of the said *James Cooke*; that, as the bishop only claimed the admission, he also recovered against the bishop, but execution was stayed &c; and that in the *Michaelmas* term following he also recovered against *Daniel Cresspin*, (stating the pleadings, the issue joined, the verdict, and the judgment;)

ment (a); on which, on the 13th day of *February* in the twenty-second year of the reign &c there issued a writ to the bishop, directing him to amove *D. Crespin* from the vicarage &c and to admit a fit person to the vicarage on the presentation of *Lomax* (the now defendant); by virtue whereof the bishop removed *D. Crespin*, and at the presentation of *Lomax* (the now defendant) admitted and instituted *D. Bellamy*, (the other defendant) who hath ever since been and still is parson &c;—averring that *James Cooke*, *Edward Barker*, (the father) and *Edward Barker*, (the son) in the lifetime of *Edward Barker* (the father) never did agree among themselves to present a fit person to the church, and that *J. Cooke* and *Edward Barker* (the son) after the death of *E. Barker* never did agree among themselves to present &c.

1752.
BARKER
against
LOMAX.

The third plea of the defendant *Bellamy* was the same, mutatis mutandis.

To these pleas there was a general demurrer.

The case was argued the first time by *Bootle* Serjt. for the plaintiff, and *Poole* Serjt. for the defendants on *Thursday* the 13th of *June* 1751, and the second time by *Prime* Serjt. for the former and *Draper* Serjt. for the latter on the 6th and 7th of *February* 1752. The Court took time to form their opinion, which was afterwards delivered, as follows, by

Willes, Lord Chief Justice. "As the pleadings are very long, I shall only state such parts of them as are material to the point in question. The bishop claims nothing but as ordinary, so there is a judgment as of course against him. The defendants *Lomax* and *Bellamy* have pleaded severally four pleas, but the same in effect; issues have been joined on the first second and fourth pleas, and found for the defendants; two of them by a jury and the other by a certificate of the bishop (b). But there is a general demurrer to the third plea; and it is that only that now comes before the Court.

(a) That case gave rise to the question in *Barnes* 139, whether or not in quare impedit the plaintiff were entitled to costs. See also *Thrale and Others v. The Bishop of London and Others*; 1 H. Bl. Rep. 530, where it was holden that a defendant

in quare impedit, who obtains judgment on demurrer, is not entitled to costs.

(b) This was a certificate of the institution &c of one *Perkins*, stated in the pleadings.

1752.

BARKER
against
LOMAX.

I shall therefore only state that plea. (His Lordship here stated it.) This plea concludes with an averment that *Edward Barker* the father in his lifetime and the plaintiff *Cooke* never did agree to present a proper person, and that *Edward Barker* the plaintiff and *Cooke* never did agree since the death of *Edward Barker* the father to present, and this is confessed by the demurrer.

This is the case of copartners, or their assigns, who according to the express words of Lord *Coke* (which I shall mention by and by) stand on the same foot in respect to this question as the copartners themselves. If this were the case of tenants in common, I own it would be a case of very great difficulty, and it would be necessary that we should take more time to consider the several cases that have been cited in respect to tenants in common, and the doctrine of summons and severance, which is a very nice point. But we think that we can determine this case on a very plain point, and without entering into consideration of these matters at all.

I cannot say that there is any case exactly in point to warrant the judgment that I am going to give; but there is no case against it, and so we are at liberty to give our judgment as we please; and we think that it is warranted by reason and justice, and likewise supported by the authority of some cases which are very like this, though they do not quite come up to it. And the opinion which we are of is this, that this being the first turn, to which *Cooke* had a right to present as he married the eldest copartner, and as it is agreed that he and *Barker* did not agree to present, the judgment against *Cooke* will be a bar to a quare impedit brought by *Barker* to present to this turn, but that it will not at all affect his right to present after the next avoidance.

As *Barker* was not a party to that suit, it is not reasonable that he should be at all affected by a judgment by default against *Cooke*. But he ought neither to be in a better or a worse condition than if there had been no such suit or judgment. He would be in a better condition if he could present to this turn, and in a worse if his right to present to the next turn would be at all affected: but we think that he will be neither.

Lomax

Lomax cannot claim any right to present to the *next* turn by virtue of a judgment in a suit to which *Barker* was not a party, and *Cooke* cannot claim a right, because he has suffered *Lomax* to present to his turn.

1752.

BARKER
against
LOMAX.

Besides the reason of the thing, I shall mention two or three passages in *Coke*, and three or four cases in the old books, which we think warrant this opinion. As to the doctrine of joint-tenants and tenants in common, I shall not intermeddle with it, because neither of these is the present case; and there the right of advowson is entire, which it is not in the case of partners, especially when they do not agree to present the same person: but I shall confine myself to such passages and cases as relate to partners or their assigns.

Co. Lit. 186. "If two or more coparceners be, and they cannot agree to present, the eldest shall present, and if her sister doth disturb her, she may have a quare impedit against her; and so shall the issue and the assignee of the eldest; and in the same manner the tenant by the curtesy of the eldest shall present (a)." By the stat. 2 *Westm. c. 5.* it is enacted thus, "Cum advocatio descendit particibus, licet unus bis presentet et usurpet super cohæredem, non propter hoc exclusus sit ille in toto qui fuit negligens, sed alias habeat turnum suum præsentandi cum acciderit." And Lord *Coke* in his comment on that statute, 2 *Inst.* 365, says, "By the common law, if an advowson descend to divers coparceners, if they cannot agree to present the eldest shall have the first turn and the second the next, et sic de cæteris; every one in turn according to seniority, and this privilege not only extends to them and their heirs, but to the several assignees (b), whether by conveyance or by act in law as tenant by the curtesy. And if any stranger usurp on the turn of any one of them, this does not put the other out of possession; and this law doth extend to usurpations as well before partition as after." The same doctrine is expressly laid down in 2 *Roll. Abr.* 346. G.; and many cases out of the year books are cited to this purpose.

(a) See note 2 in *Co. Lit.* 166. b. by the late learned editor.

(b) *Harris v. Nichols*, *Gro. Eliz.* 18.

S. P. per *Meade*, *Windham*, and *Periam*, Justices; dubitante *Anderson* Ch. J.

But

1752.

BARKER
against
LOMAX.

But the two cases on which I principally rely are in *Bro. Abr. tit. Presentation, f. 26. 24 E. 3*; and *Bro. Abr. tit. Quare Impedit, pl. 118. 2 H. 7*. The former is thus; *A.* and *B.* have a right to present to a vicarage by turns; *A.*, whose turn it was, let the living lapse to the bishop who collated a person to it, and upon his death *B.* presented; and he'd that he had a good right; for that *A.* by letting the living lapse to the bishop had lost his turn, and that it should not be any prejudice to *B.* The other case was this; four copartners of an advowson; the first daughter presents to the first avoidance; the second daughter to the second; and on the third avoidance a stranger usurps on the third daughter and presents by usurpation, and such presentee was instituted and inducted and died; the fourth shall not lose her turn by the third daughter's suffering a stranger to present by usurpation, but shall present to that avoidance; in this the whole Court agreed, though they doubted about some other points of the case.

On these cases we think we may found our present opinion, and consider this judgment upon the same foot as an usurpation or a lapse; and I think it is rather stronger than either; for it is in nature of a grant or release to *Lomax* of this turn in the strongest manner that can be.

Upon this foundation we are of opinion that judgment on this plea must be for the defendants; and shall be of opinion that *Barker* has a right to present to the next turn if ever that matter shall come judicially before us (a)."

(a) See *Thrale and Others v. The Bishop of London and Barker*, 1 H. Bl. Rep. 376, where the question arose on Barker's right to present.

1755.

PENDOCK on the Demise of Wm. MACKINDER against
MILDRED MACKINDER and Others.

H. 28 G. 2.
Saturday,
February 1.

ON the trial of this ejectment in *Kent* before Mr. J. Denison a verdict was given for the plaintiff, subject to the opinion of this Court on the following case.

A person convicted of petit larceny not a competent witness; nor a credible witness to attest a will, under stat. 29 Car. 2. c. 3.—It is the crime, and not the punishment, that makes a man infamous.

2 Will. 18.
8. C.

The lessor of the plaintiff claimed a fourth part of certain premises in the declaration mentioned, being of the nature of gavelkind, as one of the brothers and coheirs in gavelkind of J. Mackinder deceased, who died seised thereof in fee. The defendant M. Mackinder, under whom the other defendants held, claimed under the will of J. Mackinder, (who was her husband,) dated September 23d 1750, duly signed sealed and published, and attested and subscribed by three witnesses, namely T. Turner, Joseph Jeffery and J. Fletcher. J. Fletcher being produced as a witness proved the will to have been signed sealed and published as above; but the plaintiff's counsel objected that the will was ineffectual to pass lands because Jeffery at the time of publishing the will was not a credible witness within the words and meaning of the statute of frauds, 29 Car. 2. c. 3. s. 5, he having been convicted of petit larceny; and a copy of the record of conviction was produced in evidence, by which it appeared that Jeffery had been convicted in 1739 of stealing to the value of 10*d*. for which he was sentenced to be whipped. The question reserved for the consideration of the Court was, whether J. Jeffery after such conviction and judgment could be deemed a credible witness to attest and subscribe a will of lands within the words and meaning of the statute of frauds.

This case appears to have been argued on three several days, 6th of February, 17th of May, and 27th of June 1754, on the two former by Wynne Serjt. for the plaintiff and Poole Serjt. for the defendant, and on the last by Prime Serjt. for the former and by Willes Serjt. for the latter. And on this day

1755.
 PENDOCK
 against
 MACKIN-
 DEB.

Willes Ch. J. delivered the unanimous opinion of the Court, after stating the case, as follows.

"There is but one single question whether or not *J. Jeffery* were a competent witness; for if not, he is not a credible one, and then there were but two witnesses to the will. And I shall confine myself to the question before us, because I have observed great mischiefs arise from Judges giving obiter opinions. Therefore I shall not consider whether persons convicted of manslaughter and many other offences can be witnesses either before or after they have had their clergy, but shall speak only to this single question, whether a person convicted of petit larceny be a competent witness or not?

But before I speak to it particularly, I will lay down this rule, which, though it has been sometimes disputed, is undoubted law and founded on the best reason, that it is the crime and not the punishment that makes a man infamous and consequently no witness. To illustrate this I could mention many instances, but shall only mention one which will make this point so very clear that I need mention no other. To be sure at common law infamous punishments were generally inflicted for infamous crimes: but there were some few instances to the contrary; and there have been more of late, as the law has been altered by several acts of parliament, and as some precedents have been made which I am sure I shall never follow. But, as I said, I will mention only one instance: the pillory has always been considered as the most ignominious punishment of all; and yet by 3 & 4 W. & M. c. 10. deer-stealers are to forfeit 30*l.* to be levied by distress and sale of goods, and if no distress the offender is to be set in the pillory. Now no one can be so absurd to say that if a deer-stealer is worth 30*l.* he is not infamous and may be a witness, but if he is not worth 30*l.* he is infamous and his testimony cannot be received. Of this opinion were those great judges Lord *Hale* and Lord Ch. J. *Treby*, as appears in 5 *Mod.* 75. *R. v. Davis* and *Carter*. And however this rule may interfere with some determinations that were formerly given in respect to other offences, it cannot contradict the judgment that I am going to give, for here both the crime and the punishment are infamous.

Having

Having laid down this general rule, I will now consider the nature of petit larceny. No one certainly can be guilty of stealing but a man who has a wicked mind. Whether he steal things of more or less value, though the injury be greater or less to the party robbed, the wickedness in the felon is the same, nay I think rather greater where the thing stolen is of little value, for there the temptation is less.

I shall now briefly consider the cases that were cited. *Co. Lit.* 6. b. Persons convicted of felony are infamous, and cannot be witnesses. *Ib.* 158. a. Such persons cannot be on a jury, for it is a maxim in law repellitur à sacramento infamis; which I think holds, for the same reason, as strong in the case of a witness as of a jurymen. In 3 *Insh.* 218. Lord Coke says that persons convicted of petit larceny might and had been put in the pillory at the discretion of the Judges; which shews that it was considered as an infamous crime. In 2 *Bulstr.* 154. a person attainted of felony is said to be infamous, and cannot be a jurymen or a witness. In 1 *Hale H. P. C. c.* 43. p. 503. grand and petit larceny are both felonies, and the nature of the offence is the same in both. So in 2 *Hale P. C. c.* 37. p. 277. a person convicted of felony is not a competent witness. In 1 *Hawk. P. C. fo.* 95. f. 36. petit larceny is felony; and 2 *Hawk.* 432. f. 19. persons convicted of felony cannot be witnesses. In trials per pais, there is an instance where the Chief Justice of the Common Pleas at the *Lent* assizes in *Suffolk* 1657 would not allow a person convicted of petit larceny to be a witness. I put this case last, because it was only a circuit of opinion, and is taken from a book of no great authority. I could mention many more cases to the same purpose, but I forbear citing them, because no one case was cited on the other side where such persons had been allowed to be witnesses. The act of Grace 20 *Geo.* 2., though insisted on at first, was immediately given up, because there is an exception in that statute of all persons convicted of felony before 1747.

For these reasons, and on the authority of these cases, we are all of opinion that *J. Jeffery* at the time of making the will of

1755.

PENDOCK
against
MACKIN-
DER.

1755.
Pembrock
against
Mackinder
Dea.

of *J. Mackinder* was not a credible witness; that consequently the will was attested by two credible witnesses only, and so no real estate could pass by that will; and therefore that the defendants who claim under that will have no title. Therefore the verdict given for the plaintiff must stand, and the postea must be delivered to him (a)."

(a) But now by stat. 31 Geo. 3. c. 35. | competent witness by reason of a conviction for petit larceny.
it is enacted that no person shall be an in-

E. 28 G. 2.
Tuesday,
May 6th.

PEARSON against ROBERTS and GROOM.

[Hil. 27 Geo. 2. Rel. 668.]

An action of replevin to recover damages is an action within the meaning of the stat. 24 Geo. 2. c. 44., which requires a plaintiff to demand a copy of the warrant of a justice under which an officer (defendant) acted before he brings his action.

THIS was an action of replevin for taking the plaintiff's horse, to which the defendants pleaded, first, that they did not take the horse, and secondly that they were not guilty; and at the trial at the Lent assizes at Bedford 1754 before Mr. Justice Denison a special case was reserved for the opinion of this Court.

The defendants were surveyors of the highways for the parish of *Eaton Bray* in the year 1753, in which year the plaintiff, an inhabitant of the same parish occupying a corn-mill and some lands there of the yearly value of 22*l.*, kept and used there two carts, two waggons, and ten horses, in his business of a miller and badger and in carrying his goods for hire and in husbandry. Six days were duly appointed, and due notice thereof given, for the parishioners to go to the highways and do their respective duties, pursuant to the provisions of the several statutes. Pursuant to such appointment and notice the plaintiff attended the highways with one wain or cart furnished after the custom of the country, viz. with three horses and two men on each of the six days. But the defendants' insisting that he ought to have done duty with two wains or carts furnished with three horses and two men each, made a complaint before two justices &c, who on hearing the complaint &c adjudged that the plaintiff had been guilty of neglect of duty, and that he had forfeited 3*l.*, namely, 10*s.* for each of the said six days; and in order to levy the penalty the jus-

Justices granted a warrant of distress, directed to the defendants, who took and impounded the plaintiff's horse as a distress in order to sell him for the purposes of the warrant; whereupon the plaintiff levied his plaint in replevin, wherein the said action was to be determined, without having first demanded in writing the perusal or copy of the warrant.

1755.
PEARSON
against
ROBERTS.

The questions for the consideration of the Court were, whether the plaintiff were by law compellable to go with or to send more than one wain or cart on every of the six days;

If not, whether the plaintiff before the commencement of the action ought not to have demanded in writing a copy or perusal of the warrant of the justices?

If the Court should be of opinion with the plaintiff on both points, then the postea to be delivered to him; otherwise the postea to be delivered to the defendants, and the verdict to be entered for them, damages &c. and costs according to the statutes.

After two arguments at the bar, the first on the 18th of November 1754 by *Prime King's Serjt.* for the plaintiff, and *Draper Serjt.* for the defendants, and the second on the 1st and 3d of February 1755 by *Wynne Serjt.* for the former, and *Willes King's Serjt.* for the latter, the Court took time to consider of their opinion; and now it was delivered, as follows, by

Willes Ch. J. (after stating the case and the questions reserved). "If the Court are of opinion with the defendants on either of the questions, the plaintiff cannot recover; so that we need not of necessity give our opinions on both questions if we are of opinion with the defendants on either of them: but as both are submitted to the Court, and as the first question is of public concern and is that which was principally intended to be considered, we think it best to give our opinions on that also, though on the second question we are of opinion with the defendants.

The first question depends on the several acts of parliament alluded to. By stat. 2 & 3 Ph. & M. c. 8. s. 2. every per-

1755.
PEARSON
against
ROBERTS.

son for every plough land which he shall occupy in a parish, and every other person there keeping a draught or plough, shall find and send at every day [4 days] and place to be appointed for amending the ways in that parish *one wain or cart* furnished after the custom of the country with oxen horses or other cattle, and all other necessities meet to carry things convenient for that purpose, and also two able men with the same; under pain of every draught making default 10s. The stat. 5 *Eliz. c. 13.* makes no alteration; it only appoints six days instead of four. By stat. 18 *Eliz. c. 10. s. 4.* every person occupying and keeping in his hands in possession several or divers plough lands in several or divers towns shall find in each town or parish (where the plough lands in his occupying do lie) one cart or wain furnished &c for the amendment and repairing of the highways within the several parishes where the said plough lands lie, as if he were a parishioner dwelling within the parishes where the said plough lands do lie. The stat. 22 *Car. 2. c. 12.* makes no alteration in respect to this point; nor does that of 7 & 8 *W. 3. c. 29*; only the fifth section says that any person, who shall have in his occupation wood land or other land to the value of 50*l.* a-year, shall be deemed to have a plough land as to all the statutes concerning the highways. But the words of the statute of *Philip & Mary* are plain and clear, that no person shall send more than *one wain or cart*. But some books and cases were cited to shew that this had been long ago determined otherwise; and that the same construction had been put by the Court of King's Bench on the statute of *Philip & Mary* as was put on it by the *Bedfordshire* Justices. But when they are examined, they will be found to be of no weight. The case of *Rex v. The Inhabitants of Fulham, M. 27 Car. 2. B. R.* reported in 3 *Keb. 567*, and referred to by *Dalton, c. 50.* was chiefly relied on: but when looked into, it appears to be no authority at all. My Brother *Draper* was pleased to furnish us with copies of the orders that were made in the King's Bench in respect to this matter. And yet the mistake of this case is the only foundation of *Dalton's* opinion. Possibly upon this motion some expressions may have fallen from some of the Judges in favor of this notion; but if they did, such extrajudicial sayings concerning a matter not properly before them can be but of very

1755.
PEARSON
against
ROBERTS.

very little weight, especially when the words of an act of parliament are so plain and clear as they are in the present case. The case in *Sir T. Raym.* 186. is no determination at all, and only what was said on a fine set by Justice *Morton*, who to be sure had no authority at all to do what he did; and therefore the Court set it aside. Besides, the report of that case is very dark and obscure. Therefore, as to the first point, we are of opinion with the plaintiff (a).

But we think that the second point is against him; for the words of the stat. 24 G. 2. c. 44. s. 6. are so very plain and extensive that it is impossible to get over them. The words are *no action shall be brought against any officer or any person for any thing in obedience to any warrant under the hand and seal of a justice of peace until a demand in writing hath been made of the perusal and copy of such warrant; which is admitted not to have been done here.*

The answer that was attempted to be given to it was that a *replevin* is not an *action*: but it is certainly as much an action as any other whatsoever. It proceeds by writ declaration and plea or avowry in the same manner as other actions: the person who brings it is called a plaintiff, and the person against whom it is brought is called a defendant or avowant, according to the nature of his defence: costs are given to the plaintiff and defendant or avowant in the same manner as in other actions; it is considered as an action in the statute 4 & 5 An. c. 16; and in most of the statutes concerning replevins, particularly in 7 Hen. 8. c. 4; and 17 Car. 2. c. 17. it is expressly called an action or suit.

But to shew that it was not intended to be within this clause of this statute, an argument was drawn from the first section of the act, where the words are as general in respect to *actions* brought against justices of the peace, and that directs that at least a month before any action commenced notice in writing shall

(a) But an alteration has been since made in this respect by the general highway act, 13 Geo. 3. c. 78. s. 34; by which the occupier of lands &c is liable to

provide one waggon, cart &c, furnished after the custom of the country with horses &c and two able men, for every 50 l. a-year occupied by him &c.

1755.
PEARSON
against
ROBERTS.

be given to the justices. It was argued that the word "action" must be taken in the same sense in both these clauses, and that this could never be intended to extend to replevins, for if it did it would entirely take away the benefit of replevins in these cases, because before the month after the distress the goods taken might be sold or spoiled, and so the party would be without remedy. But this argument arises from a mistake, in not considering the nature of replevins, and that there are two sorts of replevins; one only to have the goods again, which may be by plaint in the Sheriff's Court, or a mandatory writ to the sheriff; and another by way of action in order to recover damages. Now the first sort of replevin is certainly not an action, and to that to be sure the statute does not extend. But the second, which is the present case, as I have already shewn, is plainly an action; and this we are all of opinion is clearly within the words of this act (a); and that therefore the plaintiff, not having demanded a perusal and copy of the warrant before the action commenced, can have no judgment in this action.

Another point was started that a replevin will not lie in the present case, the distress being in the nature of an execution (b).

(a) See *Milward v. Caffin*, 2 Bl. Rep. 1331. But see also Lord Kenyon's observation upon it in *Harper v. Carr*, 7 D. & E. 274.

(b) On authority as well as principle, it seems as if the goods taken in this case could not be replevied. Lord Chief Baron Gilbert indeed (*Gilb. Replevin*, 161) says "If a superior jurisdiction award an execution, it seems that no replevin lies for the goods taken by the sheriff by virtue of the execution; and if any person should pretend to take out a replevin, the Court of Justice would commit him for a contempt of their jurisdiction. But if any inferior jurisdiction issues an execution, a replevin will lie for the goods taken by that execution, because, the inferior jurisdiction being restrained within particular limits, the officer who took the goods is obliged to shew that he took the goods within those limits, and that the

inferior court which issued the execution did not exceed their authority in issuing it; besides an inferior court of record cannot commit for contempt out of the court." But, with great deference to so high an authority as Lord Chief B. Gilbert, the two reasons given for the latter position by no means warrant it. His first reason fails, if the officer took the goods within the limits of the particular jurisdiction, and if the inferior court did not exceed their authority in issuing the execution; in short if it be a legal execution regularly executed. And, with regard to the second reason, it does not follow, because an inferior court cannot commit for a contempt out of court, that therefore a replevin will lie: the want of authority to inflict one particular (and that an extraordinary) punishment for doing the thing does not prove that the thing itself may be legally done.—The only authority

But this is not one of the questions reserved, and besides is not now at all material. If we had been of opinion with the plaintiff on both the points reserved, it might have become material: but as we are not, I shall say nothing upon this point, for I do not like to moot points that are not before us and are no ways material.

But being of opinion for the defendant on the second question, the *postea* according to the rule must be delivered to him, and a verdict is to be entered for him with *i. s.* damages and costs."

authority cited by *Gilbert* in support of this opinion is the case of *Aylesbury v. Harwey*, 3 *Lev.* 204; of which it is sufficient to observe, 1st, that this question was neither agitated at the bar or decided by the bench, and 2dly, that the judgment of the Court was against the plaintiff in replevin. But in opposition to this opinion may be placed *Bradshaw's* case, 7 *T. 12 W.* 3. *C. B.*, 6 *Bac. Abr.* 55. oct. ed.; *R. v. The Sheriff of Leicestershire*, 1 *Barnard. B. R.* 110; *R. v. Monkhouse*, 2 *Str.* 1184, and *R. v. Burchett*, *ib.* not. 1.; in which it was decided that where an act of parliament orders a distress and sale of goods it is in the nature of an execution, and a replevin does not lie; and in two of which cases an attachment was granted, in the one against the sheriff, and in the other against the party, for replevying: and in *R. v. Burchett*, from a MS. note, it is said "The ground of the decision was that the conviction was con-

clusive, and it's legality could not be questioned in a replevin."—In *Milward v. Caffin* indeed (2 *Blac. Rep.* 1330.) goods taken under a warrant of distress for nonpayment of a poor-rate were replevied, and the plaintiff in replevin succeeded: but there the special jurisdiction, which was given to the justices of the peace by the statutes 43 *Eliz. c. 2.* and 17 *Geo. 2. c. 38.*, was exceeded; and the goods were not, in contemplation of law, taken under an execution. And in a late case, *Pritchard v. Stephens*, 6 *D. & E.* 522., where goods taken under a warrant of distress granted by commissioners of sewers were replevied, and the proceedings in replevin removed into the King's Bench, that Court refused to quash the proceedings on a summary application, leaving it to the defendant in replevin to put his objection in a formal manner on the record.

1755-

PEARSON
against
ROBERTS.

DOE on the Demise of MILBURN and ANN his Wife
against D. SALKELD and Three Others.

T. 28 & 29
Geo. 2.

ON the trial of this ejectment before Mr. Baron Legge at Newcastle-upon-Tyne, a special case was reserved, in substance as follows.

and conveyed certain lands to B. and C. and their assigns, to hold to the use of B. and her assigns for life in bar of dower, and then to the use of the heirs of the body of B. by A., remainder over; and covenanted that the premises should remain and continue to the uses and intents aforesaid: Held that this deed operated as a covenant to stand seised; and that an only child of the marriage was entitled, after the deaths of A. and B.

A., in con-
sideration of
an intended
marriage
with B.,
gave granted

1755.

Doe dem.
MILBURN
against
SALKELD.

The lessors of the plaintiff claimed under a deed of settlement, dated the 22d of June 1725, and made between *G. Simpson* of the first part, *Ann Storey* daughter of *J. Storey* of the second part, and *W. Storey* of the third part; by which *G. Simpson*, in consideration of a marriage then intended to be had between him and *A. Storey*, and for a competent jointure for *A. Storey* and for a maintenance and provision for her during her life if she should survive *G. Simpson*, and for divers other good causes and considerations, gave granted released enfeoffed conveyed and confirmed to *Ann Storey* and *W. Storey* and their assigns the premises in question then in his possession, to hold to the use and behoof of the said *Ann Storey* and her assigns for life for and in full recompence and satisfaction of the dower which she by reason of the said marriage might claim, and after the decease of both the said *George* and *Ann* then to the heirs of the body of the said *Ann* lawfully begotten by the said *George*, and for default of such issue then to the use of the right (a) of the said *G. Simpson* for ever. In the deed were contained covenants by *Simpson* that he was seised in fee of the premises in question, that he had a right to convey them to the said *A. Storey* and *W. Storey* their heirs and assigns in manner aforesaid according to the true intent and meaning thereof; that the said premises should remain and continue unto the uses intents and purposes aforesaid and according to the true intent and meaning thereof discharged of and from all manner of incumbrances; and that he (*G. Simpson*) and his heirs &c would from time to time do and execute all such further acts and assurances for the better assuring and conveying of the said premises to the uses intents and purposes aforesaid as *W. Storey* his heirs or assigns should require. The marriage took effect; and *G. Simpson* and *Ann* his wife are both dead, leaving an only child *Ann* one of the lessors of the plaintiff and the wife of the other lessor, *Milburn*. About five years after executing the above deed *G. Simpson* became a bankrupt; and his assignees by lease and release dated the 26th and 27th of May 1731 for a valuable consideration conveyed the premises in question to *J. Wainhouse*, under whom the defendants claim.

After two arguments at the bar the first time on the 26th of June 1754 by *Poole* Serjt. for the plaintiff and *Prime* King's Serjt.

(a) So in the original instrument, which was full of blunders.

for

for the defendants, and again, on the 6th of February 1755 by *Wynne* Serjt. for the plaintiff, and *Willes* Serjt. for the defendants, *The Court* took time to consider of their opinion which was now delivered, as follows, by

1755.
Doe dem.
MILBURN
against
SALKELD.

Willes Lord Ch. J. (after stating the special case).

"This deed of the 22d of June 1725 cannot be considered as a bargain and sale, because there was no money consideration. And as there was no lease to make this deed good as a release, no livery to make it good as a feoffment, and as the deed could not operate as a deed of confirmation because the grantees were neither of them in possession, the only question is whether it shall operate as a covenant to stand seised.

As most of the cases that have been determined on this head depend on the particular wording of the deeds, which have been construed as covenants to stand seised, and there are scarcely any two of them that are exactly like one another, I shall not mis-spend your time in going through all the cases that have been cited or might be cited on this occasion, but shall only mention some general rules on which all these cases are founded, and shall then take notice of some few cases that most resemble the present, and which are determined on the same reasons on which we shall determine this, and likewise two cases which are the only ones of any weight that were insisted on as authorities against the opinion which I am going to give.

First, I shall mention what is said by Lord *Coke* in his comment on the statute of uses, in 2 *Inst.* 672, and in his 7 *Rep.* 40. *Bedell's* case, the intention of the parties is the principal foundation of the creation of uses; for verba intentioni, et non è contrà, debent inservire. *Hobart*, p. 277. says, I do exceedingly commend Judges that are curious and almost subtle, astuti, (a word used in the proverbs of *Solomon* in a good sense when it is to a good end,) to invent reasons and means to make acts operate according to the just intent of the parties, and to avoid wrong and injury which might be occasioned

by

1755.

Dor dem.
MILBURN
against
SALKELD.

by rigid rules and adhering too strictly to the words themselves. This advice of Lord *Hobart* has been taken notice of by the Judges, and referred to in many of the cases of covenants to stand seised, as an excellent rule to go by, and I think we cannot observe any better. Mr. *Shepherd*, or whoever was the author of that book, says in the *Touchstone of Common Assurances*, p. 87. (and for what he says he quotes very great authorities) that too much regard ought not to be had to the native and proper significations of words and sentences to prevent the plain intention of the parties. For that the construction ought to be such as that the whole deed and every part of it may take effect as far as possible to the purpose for which it was made; so that when the deed cannot take effect according to the latter it may take some effect or other; for *benignè faciendæ sunt interpretationes chartarum, ut res magis valeat quam pereat; et quælibet concessio fortissimè contra donatorem interpretanda est.* In the case of *Sleigh v. Metbam*, 1 *Lutw.* 782. the Court, in giving their judgment, laid down a great many good rules of the same sort as these which I have mentioned, and very applicable to the present case: but they are too long to repeat, and therefore I shall only mention one paragraph, and refer to the rest; "The words (says the book) of a deed ought to be so moulded, and such construction put upon them, that the intent of the parties may take effect, if possible. The words *covenant to stand seised to uses* are not of necessity to create uses, but words tantamount are sufficient, and there is no conveyance that admits such a variety of words as that of a covenant to stand seised."

Having laid down some general rules and reasons by which we have governed ourselves in the determination of the present case, I shall only mention three or four cases that most resemble the present, and that are authorities for the plaintiff in the present case.

1. *Bedell's case*, 7 *Co.* 40. There *R. Bedell* by indenture between himself and his wife of the first part, *James* his second son of the second part, and *Michael* his third son of the third part, *in consideration of natural love to James and Michael* his sons, and for their preferments and advancement,

covenanted to stand seized to the use of himself for life, and after his decease to the use of his wife for life, and after their deceases to the use of *James* in tail as to one moiety and to the use of *Michael* in tail as to the other moiety: it was objected that no use arose to the wife, because she was not within the considerations expressed in the deed, and no other consideration could be averred: but it was answered and resolved by the Court, 1st, that a consideration, which stands with the deed, and is not repugnant to it, might be well averred (a); and 2ndly, that if no other consideration could be averred, there was an express consideration in that deed, for when the grantor limited it to the use of his wife for life, that imported a sufficient consideration in itself.

1755.
Doe dem.
MILBURN
against
SALKELD.

2. The next is the case of *Crossing v. Scudamore*, reported in 1 *Ventr.* 137; 1 *Mod.* 175; and 2 *Lev.* 9; *A.* seized in fee bargained sold and enfeoffed to his daughter *Jane* and her heirs certain lands in consideration of natural love and affection as an augmentation of her portion and preferment of her in marriage; and there was a covenant for her quiet enjoyment; the deed was enrolled within six months: but it could not operate as a bargain and sale for want of a money consideration, nor as a feoffment, because there was no livery; but it was adjudged in the Court of King's Bench, and afterwards that judgment was affirmed in the Exchequer Chamber, that it should operate as a covenant to stand seized. It is said in the case, as reported in 1 *Mod.*, contrary to what is said both in *Ventris* and *Levintz*, that the words "in consideration of natural love and affection" were not in the deed, and the grantor only called her his daughter: but whether these words were in the deed or not is not material, upon the authority of *Bedell's* case and several other cases; and many former cases were cited in this case in support of this opinion.

3. *Walker v. Hall* in *Scacc. M.* 29 *Car.* 2. reported in 2 *Lev.* 213. *A.* in consideration of marriage granted and confirmed to *Margaret* his intended wife certain lands to hold to her and her heirs, with a letter of attorney in the deed to make livery &c, with

(a) *Filmer v. Gott*; in *Dom. Proc.* | *habitants of Scammonden*, 3 *D & E.* 474.
7 *Bro. Parl. Cas.* 70; and *R. v. The In-* | *S. P.*

1755.

Doz dem.
MILBURN
against
SALKELD.

a blank for the name in the letter of attorney; it was indorsed that livery was given, with a blank left for the name, and and there were no witnesses of the livery: it was there holden that it could not amount to a feoffment, but that it was a good covenant to stand seized.

4. *Osman v. Sheafe*, M. 5 W. & M. in B. C. in 3 Lev. 370; and reported by the name of *Osmere v. Sheafe* in *Carth.* 307. *M. Waller* for the affection which she bore to her cousin Sir *W. Brodman* gave and granted to him and his heirs a rent of 14*l.* a-year to hold to him and his heirs after her decease if she died without a son: there was no attornment, so it could not operate as a grant, but held that it should be good as a covenant to stand seized; for the Court said that it appears by the cases there cited that the Judges of late times have had more consideration to the substance, viz. *the passing of the estate*, than the shadow, to wit, *the manner of passing it*.

The case of *Goodtitle v. Petto* (a) is not material to the present case. There *Angelo Burt*, being seized in fee, in consideration of the love and affection which he bore to *Anne* his wife and for her issue covenanted to stand seized to the use of himself and his wife for their lives and the life of the survivor, remainder to the issue of their two bodies, remainder to the use of such person as his wife should think fit to dispose to, and for want of such disposition to the use of the lessor of the plaintiff: after the death of *Angelo* without issue, the wife conveyed the premises to her sister and her heirs, reciting her power, and she by her will gave the premises to the defendant: the lessor of the plaintiff was nephew to *Angelo*; it was adjudged, 1st, that as the express consideration was only for the support of the wife the appointment was not to be for her benefit, but she had only a naked power for the benefit of strangers, they could not claim under such a consideration; and they cited *Thomlinson v. Dighton*, Salk. 239; 2dly, That the defendant, being nephew to *Angelo*, had a good title; for though he was not so mentioned in the deed, he might aver himself to be so, according to 1 Co. 176; 7 Co. 40; & 11 Co. 24.

(a) 2 Str. 934.

The only case that was greatly insisted on as an authority against the plaintiff in the present case was that of *Samon v. Jones*, 2 W. & M. 2 Ventr. 318. on a special verdict. *W. Lewis*, in consideration of natural love and affection, which he had for his wife and his son *Robert*, gave granted and confirmed unto *Robert* his son and his heirs his reversion in certain lands to the use of himself for life, then to the use of his wife for life, and after to the use of *Robert* and the heirs of his body, then to *Ellen* his daughter and the heirs of her body: *Ellen* was in possession and claimed under this deed; there was no enrolment or attornment, so the deed could not operate unless it operated as a covenant to stand seised; it was holden in the Exchequer that it should, but that judgment was reversed in the Exchequer Chamber by the opinion of Lord Ch. J. *Holt* and Ch. J. *Pollexfen*, and their judgment was afterwards affirmed in the House of Lords. They founded their opinion on the case of *Hore v. Dix*, H. 12 Car. 2. in B. R., reported in 1 Sid. 25: but there the grant was to two strangers, and it was holden that it could not operate at all as to them, because of the consideration; and even if it had been a money consideration, it would not do, because if it operated as a bargain and sale there must be an use on an use, which could not be. And the same reasons are given in the case of *Samon v. Jones*. But I own I am not convinced by either of these authorities, and think that the opinion of the Court of Exchequer was right; for though in *Hore v. Dix* the grant was to a stranger, the grant in *Samon v. Jones* was not to a stranger: however as this is a great authority, if we could not distinguish it from the present case, we must be bound by it: but it is plainly distinguishable. For this is a grant in consideration of marriage and in bar of dower to the intended wife and the issue of that marriage; the intention of the parties is clear and manifest; the consideration is expressed in the deed, though it need not have been; the conveyance is not to a stranger; and there is a covenant that the grantees shall hold and enjoy, which likens it to the case of *Sleigh v. Metham* in *Lutwych*.

So that the plaintiff is entitled to judgment, and the postea must be delivered to him (a)."

(a) Vid. *Roe d. Wilkinson v. Tranmar*, post, 682.

1755.
Dor dem.
MILBURN
against
SALKELD.

1757.

M. 31 G. 2.
Friday,
Nov. 18th.

Where the
right to tithes
is admitted,
and a ques-
tion arises be-
tween the
rector and
vicar to
whom they
are payable,
that question
is triable in
the Spiritual
Court; and
consequently
the Common
Law Courts
will not grant
a prohibition.

CHEESEMAN *against* HOBY.

THE opinion of the Court was delivered, as follows, by

Willes Lord Ch. J. "A prohibition has been moved (a) for to the Consistory Court of the bishop of *Lincoln*. *Hoby* the lessee of the impropriators (the Dean and Chapter of *Lincoln*) had sued *Cheefeman* in that court, who was an occupier of lands in *Burringham* in the parish of *Nottesford* for tithes of flax and hemp. *Cheefeman* by his plea there insisted that the tithes were small tithes, and that these tithes or an uncertain composition have been time out of mind paid to the vicar; and he insisted likewise in his plea on an endowment of the vicar in 1310, and on an agreement in 1691 between the vicar and the parishioners.

So the question to be tried in the Spiritual Court is not on a *modus* (for it is admitted that tithes in kind are due,) but whether the tithes are to be paid to the vicar or the impropriator.

A great many cases were cited, and very properly: but I shall only take notice of a few of them; because there are so many jarring cases on the head of prohibitions that it is very difficult to reconcile them. For when the power of the church ran very high, the Judges were cautious in granting prohibitions; when it did not run so high, the Judges ventured to go further in granting them.

I admit that this suit is to be considered as between ecclesiastical persons; for *Cheefeman* insists on the right of the vicar, and *Hoby* claims under the right of the Dean and Chapter, who must be considered as ecclesiastics when they insist on an ecclesiastical right. But the rule that has been laid down, that when both parties are ecclesiastics courts of law ought not to grant a prohibition, I do not at

(a) This case was argued on the Wednesday preceding by *Martin* Serjt. against the rule for the prohibition and by *Hewitt* Serjt. in support of it.

all rely on, because I think it a very absurd one and without the least colour of reason. For though one of the parties be a layman, if he do not insist on a modus or some other matter properly triable at common law, the court christian must determine the matter, and a prohibition will not be granted: on the other hand, though both parties be ecclesiastics, if either of them insist on a deed or any other matter properly triable at common law, a prohibition will certainly lie. What is said by Lord Coke and Hobart and in several other books, that where a custom is insisted on contrary to common right a prohibition ought to go, does not at all affect the present case; because here the common right, which is the payment of tithes, is admitted, and the question is only to whom they are payable.

But we found our opinions on the judgment in the case of *Drake v. Taylor*, 1 Str. 87, and the reason which is given for it at the latter end of the case; for those given in the first part I think very weak ones. The case there is the same as this; for it is between a vicar and an occupier of lands who insisted on the right of a lay impropiator and that the tithes claimed have time out of mind been paid to him. A prohibition was denied by the Court (a); and the reason assigned at the latter end of the case is, that the custom there insisted on relating to a spiritual matter and not any temporal right, or in bar of any ecclesiastical right, ought to be tried in the Spiritual Court, because 50 years make a custom by the ecclesiastical law; and therefore if the courts of law were to judge of such a custom, they would judge by a wrong rule. And for this reason we refuse a prohibition in the present case.

If *Cheefman* had insisted on a modus payable time out of mind to the vicar, a prohibition ought to go, because the Spiritual Court could not try the modus. But as the right to tithes is admitted, and the only question is whether they are to be paid to the vicar or the rector, we are of opinion that the point in question is proper to be tried in the Spiritual

(a) In that case a prohibition had been before denied by the Courts of Ex-

1757.

CHEEFMAN

against
Hobart.

1757.
CHESBMAN
against
Hoby.

Court. The endowment in 1310, and the memorandum in 1691 in respect to the present motion, are quite out of the case.

For these reasons we are all of opinion that the rule for a prohibition ought to be discharged."

H. 31 G. 2.
Friday,
Feb. 3.

ROE on the Demise of WILKINSON against TRAN-
MARR and Others.

A. in con-
sideration of
natural love
and of 100*l.*,
by deeds of
lease and re-
lease, granted
released and
confirmed
certain pre-
mises, after
his own death,
to his bro-
ther B. in
tail, remain-
der to C.,
the son of
another bro-
ther of A., in
fee; and he
covenanted
and granted
that the pre-
mises should,
after his
death, be
held by B.
and the heirs
of his body,
or by C. and
his heirs, ac-
cording to
the true in-
tent of the
deed.—Held
that the deed
could not
operate as a
release, be-
cause it at-
tempted to
convey a
freehold in
futuro, but
that it was
good as a
covenant to
stand seised.
2 Will. 75.
S. C.

A Special case was reserved on the trial of this ejectment at the assizes at York. By deeds of lease and release, dated the 9th and 10th of November 1733, Thomas Kirkby in consideration of natural love to his brother Christopher Kirkby and of 100*l.* granted released and confirmed to Christopher Kirkby the premises in question, after the death of Thomas Kirkby, to hold to the said C. Kirkby and the heirs of his body, and after their decease to John Wilkinson [the lessor of the plaintiff] eldest son of his (the grantor's) well-be-loved uncle John Wilkinson, and his heirs and assigns, and to the only proper use of the said J. Wilkinson the younger "his executors administrators or assigns for ever," he the said J. Wilkinson the younger paying to the child or children of his (the grantor's) brother Stephen Kirkby 200*l.* [and for want of such children to other nephews and nieces therein men- tioned;] and for want of such children, the estate was to be free from the payment of the sum of 200*l.* The release con- tained covenants from the grantor that he was seised in fee of the premises in question; and that it should be lawful for Christopher Kirkby or J. Wilkinson the younger, after his (the grantor's) death, peaceably and quietly to hold &c. And it was thereby covenanted granted and agreed by and between the said parties that all fines recoveries and other assurances of the said premises already levied suffered and executed by and between the said parties should enure to and for the only use and behoof of Christopher Kirkby and the heirs of his body, and for want of such issue to the proper use and behoof of John Wilkinson the younger his heirs and assigns for ever, according to the true intent and meaning of those presents. At the time of

of executing the deeds *Christopher Kirkby* paid 20*l.* part of the consideration in money, and gave his note for the remainder; and a receipt was signed by *T. Kirkby* for the whole sum. *T. Kirkby* continued seised of the premises in question until his death in 1744. *Christopher Wilkinson* died in the year 1740 without issue. *J. Wilkinson*, the lessor of the plaintiff, had no notice of the deeds of lease and release until a short time before the ejectment was brought.

1758.
 Rob dem.
 WILKINSON
 against
 TRAN-
 MARK.

The case was argued on the 9th of *February* 1756 by *Willes* Serjt. for the plaintiff, and *Poole* Serjt. for the defendant; a second time on the 25th of *June* 1756 by *Hewitt* Serjt. for the former and *Prime* Serjt. for the latter; and again a third time on the 23d of *June* 1757 by *Hewitt* Serjt. and *Prime* Serjt. And

Willes Ld. Ch. J. now delivered the opinion of the Court, as follows, first stating the case:

“It is admitted that this deed will not operate as a release, because it grants a freehold in futuro, which cannot be done. The only question therefore is whether, in respect to *John Wilkinson* the lessor of the plaintiff, it can operate as a covenant to stand seised? If it can, he ought to recover in this suit; if it cannot, judgment must be for the defendants.

A great many cases were cited in the argument of this cause, and to be sure there are a great number of cases not quite consistent with one another upon this question, what shall amount to a covenant to stand seised. But as I think that this case rather depends upon the general reason of the law and some particular rules that have been laid down in respect to covenants to stand seised, I shall not go through all the cases that have been cited, but shall only mention some few of them as authorities in point for the opinion which I am going to give, and two or three that were cited on the other side, to shew that the judgment which we are going to give does not clash with any of them.

And

1758.

ROE dem.
WILKINSON
against
TRAN-
MARR.

And we are all of opinion (for my Brother *Batburs*, though absent, has given me leave to say that he is of the same opinion with us) that this deed of release may operate as a covenant to stand seised.

And first we found our opinion on the general rules of law in respect to the exposition of deeds, which are laid down in many of the books, and which are collected out of them by *Shepherd on Common Assurances*, p. 82 & 83; in which he says that *benignè faciendæ sunt interpretationes chartarum, ut res magis valeat quam pereat*; and that *verba intentioni, et non è contrà, debent inservire*. And therefore (he says) that deeds which are intended and made to operate one way may operate another way, if the intention of the parties cannot take place, unless they operate a different way from what they were intended; and he puts these instances (amongst others) that a deed intended for a release, if it cannot operate as such, may amount to a grant of a reversion, an attornment, or a surrender, and so è converso. And that if a man make a feoffment in fee with a letter of attorney to give livery, and no livery is given, but there is in the same deed a covenant to stand seised to the uses of the feoffment, if this be in such a case where there is a consideration sufficient to raise the uses of the covenant, it will amount to a covenant to stand seised. In the case of *Croffing v. Scudamore* (a), which I shall mention more particularly by and by, Lord Ch. J. *Hale* cites the opinion of Lord *Hobart* in fo. 277. and declares himself to be of the same opinion, that the Judges ought to be curious and *subtle* (Lord *Hobart* used the word *astuti*) to invent reasons and means to make acts effectual according to the just intent of the parties. And it is said in the case of *Osman v. Sbeafe* (b), which I shall have occasion likewise to mention again presently, that the judges in these later times (and I think very rightly) have gone farther than formerly, and have had more consideration for the substance, to wit, the passing of the estate according to the intent of the parties, than the shadow, to wit, the manner of passing it. These are the general reasons that we go on; and we think that all the particular rules that have been laid down in

(a) 2 Lev. 93; 1 Ventr. 137; & 1 Mod.

(b) 3 Lev. 370; & Carth. 307.

respect to covenants to stand seised all concur in the present case. I know of no others but these,

1st, That there must be a deed.

2d, That there be words sufficient to make a covenant.

3d, That the grantor or covenantor must be actually seised at the time of the grant.

4th, That the intent of the grantor must be plain.

5th, That there be a proper consideration to raise the use.

First; This is certainly a deed; and though it cannot operate as a release, it being signed sealed and delivered by the party does not cease to be a deed.

Secondly; That there are sufficient words to make a covenant I shall shew more particularly by and by: but if there were no other word but the word *grant*, that would be sufficient according to all the cases.

Thirdly; It is admitted, and so stated in the case, that the grantor *Thomas Kirkby* was actually seised at the time of the grant.

Fourthly; Nothing can be more plain than that the grantor intended that the lessor of the plaintiff should have the estate after the death of *Christopher Kirkby* without issue; it is said so in express words in three places in the deed; what estate he was to take is not material at present, he being still living.

Fifthly; Here is a plain consideration as to *Wilkinson* the lessor of the plaintiff; he is called in the deed eldest son of his well-beloved uncle *John Wilkinson*. If it were not so said in the deed, his relation to the grantor might be averred and proved, according the case of *Goodtitle v. Petto*, 2 Str. 935, and several cases that are there (a) cited out of Lord *Coke's* reports.

Having mentioned the general reasons and likewise the particular rules on which we found our opinion, I shall now mention some few cases which I think are authorities in point. I shall not take notice of the ancient cases, because of late the courts of law have gone much farther in the determination of this question, and likewise because there are several rules laid

(a) And *Filmer v. Gott*, 7 Bro. Parl. | *Scammonden*, 3 D. & E. 474.
Caf. 70; & *R. v. The Inhabitants of*

1758.

ROE dem.
 WILKINSON
 against
 TRAN-
 MARR.

1758.
 Roe dem.
 WILKINSON
 against
 TRAN-
 MARR.

down in these ancient cases which are not now adhered to. But I shall begin with the case of *Crossing v. Scudamore*; Tr. 23 Car. 2. in B. R.; & P. 26 Car. 2. in Cam. Scacc.; reported in 1 Mod. 175; 2 Lev. 9; & 1 Ventr. 137; *Coulman v. Senbouse*, E. 30 Car. 2. B. R.; *Sir T. Jon.* 105; *Walker v. Hall*, 29 Car. 2. in Scacc. 2 Lev. 213; *Harrison v. Austin*, Tr. 3 J. 2. B. R. Carth. 38, 9; *Baker v. Lade*, B. C. H. 2 W. & M. 3 Lev. 291; & *Osman v. Sheafe*, 3 Lev. 370; 5 W. & M. B. C. [His Lordship here stated and commented (a) upon these cases.] These are all the authorities that I shall mention for the opinion that I am going to give, and I think that these are sufficient.

But before I give the judgment of the Court, I shall take notice of some objections that were made on the part of the defendants, and two or three cases that were cited to support them.

1st, It was objected that the lessor was no party to the deed. But, to be sure, this is no objection. It is not necessary that a person taking under a deed should be a party; remainders are most commonly limited to persons who are not parties, and especially in covenants to stand seised.

2dly, That there was no consideration as to *Wilkinson*: But this I have answered already.

3dly, That it was intended to be a deed at common law, and therefore cannot operate by the statute of uses. This is founded on the dictum in *Co. Lit.* 49. "Where a man hath two ways to pass lands, and both be by the common law, and he intendeth to pass them by one of the ways, yet ut res magis valeat it shall pass by the other. But where a man may pass lands either by the common law or by raising of an use and settling it by the statute, there in many cases it is otherwise." But that rule has not been observed for above an 100 hundred years last past; and most of the cases cited are determined contrary to that rule. Nor does Lord *Coke* lay it down as a general rule, but he only says that it is so in many cases. And *Shepherd*, in his book of *Common Assurances* which I have already mentioned, who has verbatim transcribed the words of

(a) Vid. *Doe d. Milburn v. Salkeld*, sup. 677.

Lord *Coke*, puts a case, which I have already mentioned, directly-contrary to this rule.

4thly, The next objection was that the deed was void, and cannot operate at all. If by this be meant void as such a deed which it was intended to be, all the cases are against the objection. If it were meant a void deed, this, as I have already shewn, is not so, it having been duly executed by the grantor.

5thly, But the main objection, and which the cases (of which I shall take notice) were cited to support, was that no estate passed by this deed to *Christopher Kirkby*, out of whose estate the other estates are to arise; and it is admitted that he can take no estate by this deed. To support this objection were cited, *Atwaters v. Birt*, 43 *Eliz. B. C. Cro. Eliz.* 856; *Hore v. Dix*, *H. 12 Car. 2. B. C. 1 Sid.* 25; and *Samon v. Jones*, 2 *Ventr.* 318. If this objection had not been so solemnly determined in these cases to be a good one, I own I should have been of another opinion; because in a covenant to stand seised the estate properly arises out of the estate of the grantor, and his intent that it should not (I think) signifies nothing. For though his intent is to be regarded *what estate* is to pass *and to whom*, I do not think it is all to be regarded *as to the manner* of passing it (of which he is supposed to be ignorant;) if it were, it would overturn almost all the cases. But I choose, rather than contradict such great authorities, to distinguish the present case from them, and I think it is plainly distinguishable. For in the present case the estate to *Wilkinson* could not be to arise out of the estate of *Christopher Kirkby*, 1st, Because he was intended only to have an estate for life, or at most an estate-tail, and 2dly, Because the lessor's estate is not to commence until after the estate granted to *Wilkinson*.

There is likewise one thing in the present case much stronger than in any of the cases that have been cited on the one side or the other; for here is not only the word *grant*, which has been often construed as a word of covenant, but likewise the grantor expressly covenants in two places in the deed that the estate shall go to *John Wilkinson* in such manner as he has granted it.

For these reasons we are all of opinion that this deed will amount to a covenant by the grantor to stand seised to the use
of

1758.

ROE dem.
WILKINSON
against
TRAN-
MARR.

1758.

ROE dem.
WILKINSON
against
TRAN-
MARR.

T. 31 & 32
Geo. 2.
Tuesday,
June 13th.

In a plea of justification under process of an inferior court erected by letters patent, it is not necessary to make a profer of the letters patent.—If it be stated in such a plea that a plaint was levied at one court and such proceedings thereupon had that a *capias* issued at the next, it will be intended that the proceedings were regular, though no summons be stated.—A battery may be justified under an arrest by *molliter manus imposuit*.

of *John Wilkinson*, and that therefore he ought to have the benefit of the verdict, and may enter up judgment upon it."

TITLEY against FOXALL.

THIS came before the court on a demurrer to the defendant's plea of justification to an action for an assault, battery, and false imprisonment.

The defendant pleaded, as to the assaulting beating and imprisoning the plaintiff on &c, and detaining him in prison for 12 hours, that King *Charles* the First by letters patent dated the 16th of *June* in the 14th year of his reign incorporated the freemen and burgeses of *Sbrewsbury* &c; and granted that the mayor aldermen and burgeses and their successors should from thenceforth have and hold within the town before the mayor and recorder, or either of them, a court of record upon *Tuesday* in every week throughout the year, and that they might hold by plaint in the same court to be levied all and all manner of *actions of all and all manner of trespasses and pleas upon the case arising within the town aforesaid* to be heard and determined before the mayor and recorder of the said town or either of them, as by the said letters patent remaining upon record in the Court of Chancery may appear. That at the court of record held in and for the said town, within the jurisdiction of the said court, on *Tuesday* the 8th of *June* 1756, before *E. Blakeway* Esq. then mayor, the defendant came into the said court and levied his plaint there against the plaintiff in a plea of *trespass upon the case*; to the damage of the defendant of 20*l.* for a *certain cause of action arising within the jurisdiction of that court*; and such proceedings were thereupon had in the same court upon the said plaint that afterwards at the said court &c on *Tuesday* the 15th of *June* 1756 before the said mayor there issued out of the said court at the instance of the defendant in the plea of the said plaint a certain writ of *capias*, directed to the three Serjeants at Mace of the said town returnable at the then next court &c to be held on the 22d of *June*, and indorsed for bail 15*l.* 3*s.* 1*d.* That the

the writ was delivered to *Robert Phillips* one of the persons named in the writ and an officer of the said court; by virtue whereof *Phillips* and the now defendant in aid of the said *Phillips* and by his command and as his assistant on the 19th of June 1756 at *Shrewsbury* and within the jurisdiction of the said court, gently laid their hands upon the plaintiff in order to arrest him for the cause aforesaid; and then and there took and arrested the plaintiff by virtue of the said writ and detained him under that arrest for twelve hours for want of bail &c., which is the same assaulting beating and imprisoning whereof the plaintiff complains &c. And as to the residue of the trespass the defendant pleaded not guilty.

1758.
TITLEY
against
FOXALL.

To this plea the plaintiff demurred specially, because the defendant did not make any profert of the letters patent of *Car. 2.* set forth in the plea.

After argument (a) by *Poole*, Serjeant, in support of the demurrer, and by *Hewitt* Serjeant contra, the opinion of the Court (b) was delivered as follows by

Willes Ld. Ch. J. "Four objections have been made on the part of the plaintiff; the first, a matter of form only, and it is set forth as cause of demurrer; the other three of substance; and therefore, if good objections, they may be taken advantage of on the general demurrer.

1st. That in the plea there is no profert of the letters patent, by which the Court is erected.

2dly. That it is not stated in the plea what sort of action it was below, to shew that it was within the jurisdiction of the Court.

3dly. That a *capias* issued without any summons.

4thly. That an arrest is no justification to the battery.

To the first objection I have given an answer already (c).

The

(a) On Friday June 2d 1758.

(b) Abf. *Clive* J.

(c) This appears to have been answered in the course of the argument, by observing that the defendant did not claim

any thing under the charter, and that he was a stranger to it, and therefore need not make a profert of it. *Bro. Abr. "Monstrans de faits."* pl. 125; 161. & 2 *Show.* 418.—And in the cases of *Moravia v.*

1758.

TITLEY
against
FOXALL.

The second and third objections were taken together, and were very strongly relied on. It was said that there were two authorities in point determined in this Court since I came into it; *Moravia v. Sloper*, and *Murphy v. Fitzgerald*: and it was said that no one would be able to advise his Client if we should be of opinion in this case (as we seemed to be) contrary to the determinations in those two cases. But before Counsel say this, they should be sure that they understand the cases that they cite, and that they state them correctly to the Court; for when those two cases are rightly stated, it will be plain that though we should determine (as we shall do) for the defendant in the present case, we shall not decide contrary to those two cases. [Here his Lordship first read the report of *Moravia v. Sloper* from *Com. Rep.* 574, and then from his own manuscript (a), to mark the difference between them.] Here it is averred that the Court below has a jurisdiction of all actions of trespass upon the case arising within the town; it is sufficiently shewn in this plea that the cause of action arose within the jurisdiction; we held in *Moravia v. Sloper* that taliter processum est would be sufficient if it did not appear (as it did in that case) that there could not have been a precedent summons; and we founded our opinion on the case of *Patrick and Johnson*, in 3 *Lev.* 403. and in several other cases there cited: It was said in that case that it was resolved by the whole Court that taliter processum est was sufficient, though it had been formerly held otherwise, and that it had been so resolved by Lord Ch. J. *Hale*, and the Court of *B. R. H. 24 & 25 Car. 2.* But in the present case a week intervened between that Court when the plaint was levied and that when the capias issued. The case of *Murphy v. Fitzgerald* (b) was just the same in every respect as that of *Moravia v. Sloper*, and so it was determined without argument.

• Fourthly. No cases were cited to support the fourth objection but *Patrick v. Johnson* (c), *Trustout v. Carpenter* (d), and the case of *Williams v. Jones*, *P. 9 G. 2. B. R.* (e) The Court,

Sloper, *sup.* 30, & *Marpole v. Basnett*, *sup.* 38. n. a., where the defendants pleaded similar letters patent without a protest, no objection was taken on this head.

(a) *Vid. sup.* 30.

(b) *Sup.* 38. n. a.

(c) 3 *Lev.* 403.

(d) 1 *Ld. Raym.* 229.

(e) *Rep. Temp. Hardw.* 298.

in *Patrick v. Johnson* seemed to be of opinion against this objection; for after it was argued and insisted on, the book says, "as to the two last objections, of which this was one, cur. adv. vult; and that the plaintiff being afterwards satisfied that these two objections would not help him, and that the Court would give judgment against him, discontinued his suit (a)." In the two other cases cited it was not pleaded *molliter manus imposuit*, as in the present case, but only an arrest, which may be two ways. If this doctrine were to prevail, all pleas of *molliter manus imposuit* would be bad, and hundreds of judgments must be set aside wherever a *molliter manus imposuit* would be a battery if not justified (b). I have looked into a great many precedents that are so, and no objection taken. I shall mention only two. In the case of *Murphy v. Fitzgerald* (c) the plea of justification was just the same as in the present case; and so likewise in the case of *Gwinne v. Poole* (d), and yet, though that was so much litigated, this objection was not taken."

1758.
TITLEY
against
FOXALL.

Per Curiam.

Judgment for the Defendant."

(a) But see the report of this case in 2 *Lutw.* 979.

(b) Vid. *Rowe v. Tutte*, *sup.* 14, and the cases there referred to.

(c) *Sup.* 38. n. a.

(d) 2 *Lutw.* 935.

A N

I N D E X

TO THE

P R I N C I P A L M A T T E R S .

A

A B A T E M E N T ,

See P L E A D I N G .

1. **A** Defendant cannot plead in abatement after making a full defence. *Alexander v. Mawman, M. 11 G. 2. C. B.* Page 40
2. But he must "defend the force and injury when" before he can plead in abatement to the disability of the person or the jurisdiction of the Court; for that is not a full defence. *ib.* 41
3. A defendant, who is sued as executor, cannot plead in abatement that a co-executor ought to have been sued with him, without shewing that the co-executor administered &c. *ib.* 42
4. Where the defendant, in pleading such a plea, said that "he and the other executor did administer divers goods &c where the said A. B.'s (the testator's)" the Court rejected the word "where" as surplusage, and held the plea good. *ib.*

A C C O U N T .

1. One tenant in common cannot maintain an action of account at common law against another as his bailiff, unless that other were appointed bailiff. *Wheeler v. Horne, T. 13 & 14 G. 2. C. B.* 208.

2. But under the stat. 4 & 5 An. c. 16. he may. Page 208
3. A bailiff at common law is answerable for what he might have received without his wilful default. *ib.* 210
4. But a tenant in common, when sued as bailiff, is only answerable for what he has received. *ib.*
5. In an action on the stat. 4 & 5 An. the plaintiff must state in his declaration that he and the defendant are tenants in common, and that the defendant has received more than his share. *ib.*

A C T I O N ,

See B Y E - L A W , No. 6, 7.
R E P L E V I N , No. 2.
W A Y , No. 4.

1. Whether an action be real or personal depends on the thing to be recovered by it, and not on the nature of the defence. *Eaton v. Southby, H. 12 G. 2. C. B.* 134
2. And therefore a replevin is a personal action, though the title to land be brought in question. *ib.*
3. An action to recover a penalty on stat. 5 & 6 Ed. 6. c. 14. must be brought in the county where the fact was committed, and not commenced in the superior courts at Westminster. *Jeffery q. t. v. Coles, M. 21 G. 2. C. B.* 634

INDEX TO THE PRINCIPAL MATTERS.

ACTION *on the Case*,

See PLEADING, No. 83, 84, 85.

1. In an action on the case by the owner of an ancient ferry against a person who erects a new ferry near to his, the plaintiff may declare on his possession. *Blissett v. Hart*, M. 18 G. 2. C. B. Page 508
2. So in an action on the case by a commoner against a stranger and wrong-doer. *Greenbow v. Ilfley*, H. 20 G. 2. C. B. 621
3. But in an action against the lord, he must set forth his title. *ib.*
4. To support an action on the case there must be *damnum cum injuria*. *Winsmore v. Greenbank*, M. 19 G. 2. C. B. 577
5. In an action on the case for enticing away the plaintiff's wife it is sufficient to state that "the defendant unlawfully and unjustly persuaded procured and enticed the wife to continue absent &c, by means of which persuasion she did continue absent &c, whereby the plaintiff lost the comfort and society of his wife," without setting forth the means used by the defendant. *ib.*
6. An action on the case may be maintained on the stat. 7 & 8 W. 3. c. 7. for a false return of members of parliament, though there has been no determination of the House of Commons on the right of election for that place. *Myddleton v. Wynn Bart.*; in error. *Cam. Scacc.* H. 19 G. 2. 601

ADMINISTRATION.

1. Administration may be granted within 14 days after the death of the intestate. *Hall v. Moss*, T. 16 & 17 Geo. 2. C. B. 428, n. a.

ADMINISTRATOR,

See EXECUTOR.

AFFIRMATION.

1. The Court refused to receive the affirmation of a Quaker on a motion for an attachment for non-performance of an order of Court. *Skipp v. Horwood*, M. 15 G. 2. C. B. 291
2. The affirmation of a Quaker cannot be received when the object of the prosecution is criminal [referred to in note b.] *ib.* 292

3. Even though in form it be a civil proceeding. Page 292

4. Except where the application is against a Quaker; there his own affirmation may be received. *ib.*
5. Where the object of the proceeding is of a civil nature, the affirmation of a Quaker may be received. *ib.*
6. Though the proceeding be in the name of the King. *ib.*

AGREEMENT,

See DEFEAZANCE, No. 3.

AMENDMENT.

1. The statutes 16 & 17 Car. 2., and 4 & 5 An. c. 16., only extend to mistakes in the names of the plaintiff or defendant, not of third persons; and therefore where to debt on a replevin bond brought by the sheriff against a surety, the defendant pleaded that A. (the party replevying) prosecuted his suit &c., and that no return of the goods was adjudged to B. (the party distraining); and the plaintiff replied that a return was adjudged to B., yet the said B. did not make return &c, this on a general demurrer was holden to be a fatal defect. *Harvey v. Stokes*, E. 10 G. 2. C. B. 5
2. Inferior courts cannot amend errors in process under statutes 8 Hen. 6. c. 12 & 15. *Morse v. James*, M. 12 G. 2. C. B. 125
3. Some of the statutes of amendment are confined to the superior courts, and some extend to all courts of record. *ib. n. d.*
4. The Court will amend a recovery wherever it can be done consistently with the rules of law. *Wynne v. Thomas*, E. 18 G. 2. C. B. 565
5. But they cannot amend the teste of a writ of entry, where it is not the misprieon of the clerk and where there is nothing to amend by. *ib.* 567

AMERCEMENT,

See COURT, No. 3, 4.

ANNUITY,

See CONDITION, No. 1.

ARBI-

INDEX TO THE PRINCIPAL MATTERS.

ARBITRATORS,

See AWARD.

ARREST.

1. A person may be arrested on a *Sunday* on an attachment for a rescue. *Anonymous*, *E. 17 G. 2. C. B.* Page 459
2. Or under an escape warrant. [Case cited in n. a.] 460
3. Or even without a warrant, if he has wrongfully escaped. *ib.*
4. But bail cannot take a defendant on a *Sunday* in order to surrender him. *ib.*
5. Nor can a defendant be arrested on a *Sunday* for non-payment of a penalty under a conviction on a penal statute. *ib.*

ASSAULT,

See PLEADING, No. 10.

ASSUMPSIT.

1. A general indebitatus assumpsit will lie for a duty in which the plaintiff claims an inheritance; *semb. The Mayor &c of Nottingham v. Lambert*, *M. 12 G. 2. C. B.* 118
2. So ruled since in several cases. *ib. n. a.*
3. If *A.* be illegally arrested by *B.* for a debt, a promise by *C.* to pay the debt claimed by *B.*, in consideration of *B.*'s releasing *A.* out of custody, is void. *Atkinson v. Settree*, *E. 17 G. 2. C. B.* 482
4. So is a promise to pay in consideration of forbearing to sue on a void security. [Case referred to, n. (1).] *ib.* 484
5. Or a promise to revive a security void in it's creation. *ib.*
6. But if it be stated in a declaration against *C.* (on a promise by him to pay *B.* a debt claimed from *A.* in consideration of *B.*'s releasing *A.* from arrest) that *B.* procured *A.* to be arrested by virtue of a certain writ &c duly issued out of an inferior court, it will be intended after verdict that the arrest was legal. 482

ATTACHMENT,

See ARREST, No. 1. AWARD, No. 11. INFERIOR COURT, No. 16.

1. An attachment granted against the prochein amy of an infant (plaintiff) for non-payment of costs after judgment for the defendant. *Slaughter v. Talkott*, *M. 13 G. 2. C. B.* 190

2. An attachment for non-performance of an award is now considered only as a civil proceeding. [Cases referred to in n. b.]

Page 292

3. The Court will not grant an attachment against an administrator for not performing a rule of Court entered into by the intestate. *Newton v. Walker*, *H. 15 G. 2. C. B.* 315
4. The Court refused to grant an attachment against a sheriff for not taking a replevin bond on his granting the replevin. *Twells v. Colville*, *M. 16 G. 2. C. B.* 375
5. But they will grant an attachment against him for refusing to pay a year's rent to the landlord according to stat. 8 *An. c. 14.* when he has taken the goods of a tenant in execution. *ib.* 376

ATTORNEY.

1. A letter of attorney ceases to have effect on the death of the party giving it. *Shipman v. Thompson*, *T. 11 & 12 G. 2. C. B.* 105
And *Wynne v. Thomas*, *E. 18 G. 2. C. B.* 565
2. Every act done under a letter of attorney must be done in the name of the principal. 105
3. The statute 12 *G. 2. c. 13.*, which prohibits attornies in prison acting as attornies, only extends to attornies for plaintiffs. *Longmore v. Rogers*, *M. 15 G. 2.* 288. n. b.

AWARD.

1. Arbitrators cannot award the costs of reference, unless power is expressly given to them for that purpose. *Candler v. Fuller*, *H. 11 G. 2. C. B.* 64
2. But they may award the costs of the cause without such special power. *ib. n. a.*
3. And if they award "the costs sustained in the action," it will not include the costs of the reference. *ib.*
4. An award may be good in part and bad in part, provided the different matters in each be distinct and not dependent one on the other. *ib.*
And *Storke v. De Smeth*, *6 Hil. 11 G. 2. Cam. Seacc.* 69
And *Johnson v. Wilson*, *Tr. 14 & 15 G. 2. C. B.* 253
5. And therefore if arbitrators award the costs of suit and the costs of reference, not having power to award the latter, the award will be good as to the former part and bad as to the latter. 64
6. If

INDEX TO THE PRINCIPAL MATTERS.

6. If arbitrators award the defendant to pay the plaintiff his costs of suit to be taxed by the proper officer before a particular day, it is the business of the *defendant* to have them taxed before that day. *Page* 65
7. If the arbitrators award *A.* to pay *B.* 100*l.* and award *A.* and *B.* to give general releases to each other, and then award *B.* to pay *A.* 20*l.* at a subsequent time, the whole award is bad. *Starke v. De Smeth.* *Page* 66
8. So if the arbitrators award *A.* to pay *B.* 30*l.* on one day, and *B.* to pay 10*l.* on a subsequent day. *ib.*
9. When a cause is referred to three persons, with power to them or any two of them to make an award, an award made by two of them is good if the third had notice of the meetings &c. *Dalling v. Matchett, M. 14 G. 2. C. B.* 215
10. But if the third had no such notice, then such an award is bad. *ib.*
11. The Court refused to grant an attachment for non-payment of a sum of money awarded and which was demanded when a rule for setting aside the award was pending. *ib.* 218
12. Several tenants in common, wishing to make partition of their land, covenanted by deed to pay their respective shares of the survey and allotments, and to abide by the award of certain arbitrators as to the allotments; the arbitrators allotted the whole in severalty, but did not direct any deeds of conveyance to be executed to vest the allotments in the respective owners; and for this defect it was ruled that the award was bad, and that no action could be maintained on the covenant for not performing the award, though the covenantors were respectively liable on the covenant for non-payment of the expence of the survey &c. *Johnson v. Wilson, T. 14 & 15 G. 2. C. B.* 248
13. When an award is void, a covenant to perform the award is also void. *ib.* 252
14. Under a submission to arbitration of all matters in difference between the parties, an award deciding all matters in difference, except one, and giving liberty to one of the parties to sue on that one, is void in toto. *Bradford v. Bryan, Tr. 14 & 15 G. 2. C. B.* 4 268

15. But an award, (made under such a reference) not in terms excepting any matter in difference, does not conclude one of the parties upon a cause of action subsisting at the time of the reference, if such matter were not laid before the arbitrator. [Cases referred to in note *b.*] *Page* 270

B

BAIL,

See ESTOPPEL, No. 3, 4.

BAIL-BOND,

See PLEADING, No. 76, 77.

BAILIFF,

See ACCOUNT, No. 1, 2, 3, 4.

BAILMENT.

1. If goods be delivered by *A.* to *B.* to keep safely, *B.* is answerable for them to *A.* in detinue though he be robbed of them. *Kettle v. Bromfall, M. 12 G. 2. C. B.* 121
2. Aliter, if they be delivered to *B.* to keep as his own goods &c. *ib.*
3. Though even in such a case he is answerable for damage arising from his own negligence. *ib. n. b.*

BANKRUPT.

1. If goods be consigned to a factor for sale, and he sell and receive the money before his bankruptcy and do not purchase with it any specific thing capable of being distinguished from the rest of his property, the consignors cannot recover the whole money from his assignees, but must come in under the commission. *Scott v. Surman, H. 16 G. 2. C. B.* 400
2. If the factor at the time of the sale agree to set off a debt of his own due to the vendee, it is the same as if the factor received so much money from the vendee, and the consignors must come in under the commission. *ib.*
3. But if the goods remain in specie in the factor's hands at the time of his bankruptcy, the consignors may recover the goods in trover from the assignees. *ib.*
4. Or

INDEX TO THE PRINCIPAL MATTERS.

4. Or if a factor sell goods for his principal, and become bankrupt before payment, and his assignees afterwards receive the money for them, the principal may recover it from them in an action for money had and received. Page 400

5. So if the factor on such a sale take notes in payment from the vendee payable to him at a future day, and his assignees afterwards receive the money due on the notes, the principal may recover it from the assignees in an action for money had and received. *ib.*

6. If the assignees of a factor (bankrupt) receive bounty money on any article under an act of parliament giving the bounty to the importer, the consignor of that article may recover such bounty money from them in an action for money had and received. *ib.* 407

7. Where a debtor gives bail on an arrest, and afterwards surrenders himself in discharge of his bail, and then lies in prison two months, he becomes a bankrupt from the time of his going to prison, not from the time of his arrest. *Tribe v. Webber, E. 17 G. 2. C. B.* 464

8. But where sham bail is put in before a Judge, as a mean to get the defendant turned over to the prison of the court, and he is immediately surrendered accordingly, the imprisonment is computed from the time of the arrest. [Case referred to, n. a.] *ib.* 466

9. And in either of these cases the property of the bankrupt vests in the assignees by relation either from the arrest, or from the going to prison. *ib.*

10. A separate commission of bankrupt may be taken out against one of several partners on the petition of a joint creditor. *Crispe v. Perritt, E. 17 G. 2. C. B.* 467

11. In such case whether the bankrupt's share of the joint debt must amount to 100*l.*? *ib.* 474

12. But a commission of bankrupt cannot be sued out against two (or three) partners. [Case referred to n. b.] *ib.*

13. A person, who buys and sells cattle, is a drover, and cannot be a bankrupt. *Mills v. Hughes, M. 19 G. 2. C. B.* 588

BARON AND FEME,
See FINE, No. 1.

BATTERY,
See PLEADING, No. 10.

BILL OF EXCEPTIONS.
In what instances they may be allowed.
Page 435. n. b.

BILLS OF EXCHANGE,
See PROMISORY NOTES.

BLANDFORD,
See JUDGMENT, No. 5.

BOND,
See OFFICE.

1. If a bond have several conditions, and one of them be void by statute, the bond is void. *Layng v. Paine, T. 18 & 19 G. 2. C. B.* 574

2. A general bond of resignation is void. *ib.* 575

BURIAL.
1. No burial fee is due at common law. *Andrews v. Cawthorne, H. 18 G. 2. C. B.* 536

2. But it may by custom in a particular parish. *ib.*

3. If the priest refuse or neglect to perform the office, he may be suspended for three months by the ordinary. *ib.* 538. n.

4. Or may be punished in the temporal courts by indictment or information if any inconvenience to the public arise from it. *ib.*

5. The burial fees in *Saint George's Bloomsbury* are fixed by stat. 3 G. 2. c. 19. *ib.* 540. n.

BYE-LAW.

1. A bye-law made by the Gunmakers' Company "that no member should sell the barrel of any hand-gun &c ready proved to any person of the trade, not a member, in London or within four miles, and that no member should strike his stamp or mark on the barrel of any such person, not a member, under the penalty of 10*s.* for each offence," was holden not good, as being in restraint of trade. *The Master &c of the Gunmakers'*

INDEX TO THE PRINCIPAL MATTERS.

- Gunmakers' Company v. Fell*, M. 16 G. 2. C. B. Page 384
2. General restraints of trade are bad. *ib.* 388
 3. Particular restraints either as to time or place are good, if for a sufficient consideration. *ib.*
 4. Instances of bye-laws, as regulations, or as restraints, of trade. *ib.* n. b.
 5. A bye-law may be good in part, though bad in part. *ib.* 390
 6. A bye-law, made by the Gunmakers' Company, inflicted a penalty, half to the use of the poor of the Company, and half to the use of the discoveror, without saying who was to sue for it; the Company may sue for it; *semb.* *ib.* 391
 7. A stranger (a discoveror) could not; *semb.* *ib.*
[Cases referred to in n. a.]

C

COGNIZANCE.

1. When either of the universities claims cognizance of a cause, it must be claimed before imparlance. *Welles v. Trabern*, M. 14 G. 2. C. B. 233
2. See the manner in which the claim must be made. *ib.* n.
3. When an attorney is plaintiff, the university is not entitled to cognizance of the cause. *semb.* *ib.* 240
4. In such a case the university is not entitled. [Case referred to in note a.] *ib.* 241

COMMON,

See ACTION on the Case, No. 2, 3.

1. The lord of a manor may inclose part of a common against tenants having common of pasture, notwithstanding they have also common of turbary, if he leave sufficient common of pasture. *Fawcett v. Strickland*, H. 11 G. 2. C. B. 57
2. But if the lord, in approving, injure the right of common of turbary, the person whose right is so injured may have an action against the lord. *ib.*
3. If, to trespass for driving away a commoner's cattle from the common, the lord justifies under an approvement of the common, alleging that he left sufficient com-

- mon of pasture for his tenants, and the plaintiff replies that he was also entitled to common of turbary, that therefore the lord wrongfully inclosed &c, and that he (the plaintiff) put in his cattle to enjoy his common of pasture, and the defendant demurs, it will be taken that the lord did leave sufficient common of pasture. Page 57
4. Common appendant only belongs to arable land. *Bennett v. Reeve*, M. 14 G. 2. C. B. 227
 5. Levancy and couchancy are incident to common appendant as well as to common appurtenant. *ib.*
 6. Common appendant can only be claimed for so many cattle as are necessary to plough and manure the tenant's arable land. *ib.* 231
 7. The party claiming a common of pasture in pleading need not say in express terms whether it be common appendant, appurtenant, or in gross: but the Court will judge of it from the nature of the right claimed. *Musgrave v. Cave*, H. 15 G. 2. C. B. 319
 8. Common of pasture, without land, may be parcel of a manor, though demised and demisable by copy of court-roll; and if it be claimed by the lord of a manor in the soil of another for a certain number of cattle, without regard to levancy and couchancy, and be not claimed as incident to arable land, it will be taken to be common appurtenant. *ib.*
 9. If, to an action on the case by a commoner for injuring his right of common, the defendant plead that he dug turves under a license from the lord, he should add that "sufficient common was left for the commoner." and if he do not, the plaintiff need not reply that sufficient common was not left. *Greenhow v. Ilsey*, H. 20 G. 2. C. B. 619
 10. If a commoner, having right of common for one beast, put on two, the lord can only distrain the one put on last unless they were both turned on together; and it must be shewn in a plea (justifying the taking as a surcharge) whether they were put on together or separately, and if the latter which was put on first. *Ellis v. Rowles*, M. 24 G. 2. C. B. 638

CONDL

INDEX TO THE PRINCIPAL MATTERS.

CONDITION.

See COVENANT, No. 3, 4.

1. *A.* by will gave a rent-charge to *B.* in lieu and satisfaction of all claim she might have on his real or personal estate and upon condition that she release all right and claim thereto to his executors; *B.* lived several years without executing any release; held that the husband of the sister was not entitled to the arrears of the annuity, for the release was a condition precedent: but if only a condition subsequent, it ought to have been performed within a reasonable time; at all events during her life. *Asherley v. Vernon*, E. 12 G. 2. C. B. Page 153
2. No words in a will or deed necessarily make a condition precedent; the same words will either make a condition precedent or subsequent according to the nature of the thing and the intent of the parties. *ib.* 156
3. Instances of independent covenants, dependent and concurrent covenants, and dependent covenants or conditions precedent. *ib.* 157. n.

CONVEYANCE,

See USES.

CONVICTION,

See WARRANT, No. 1.

COSTS,

See AWARD, No. 1, 2, 3, 5, 6. DISTRESS, No. 12. EXECUTOR, No. 8, 10, 11, 12, 13.

1. The prochein amy of an infant (plaintiff) is liable to costs, in the event of the defendant obtaining judgment. *Slaughter v. Talbot*, M. 13 G. 2. C. B. 190
2. If the plaintiff proceed after the defendant has paid money into Court, the Court will allow him *before trial* to take it out with costs to the time of paying it in, on his paying the defendant his subsequent costs. *Davis v. Mansell*, H. 13 G. 2. C. B. 191
3. But if he proceed to trial and fail, he is not entitled to the costs even up to the time of the defendant's paying money into Court. [Cases referred to in n. c.] *ib.*
4. Nor if he proceed to trial, and a juror is withdrawn. [n. c.] *ib.*

5. Nor if he enter into a consolidation rule in actions on a policy of insurance, and become nonsuit in one, is he entitled to the costs up to the time of paying money into court in the other actions that were not tried. [n. c.] Page 192

6. The stat. 18 Eliz. c. 5. s. 3., which gives costs to the defendant in a popular action if the plaintiff be nonsuit, extends to subsequent as well as prior statutes. *Williams q. t. v. Drew*, H. 16 G. 2. C. B. 392
And *The Mayor &c of Plymouth v. Werring*, H. 17 G. 2. C. B. 441

7. Where a penalty is given by a statute (even subsequent to the statute of Gloucester) to the party grieved, he is entitled to costs if he succeed. *The Mayor &c of Plymouth v. Werring*, H. 17 G. 2. C. B. 440

8. And if, in such case, he be nonsuit or a verdict pass against him, he is liable to pay costs to the defendant. *ib.*

9. An avowant for a rent-charge is not entitled to double costs under stat. 11 G. 2. c. 19. s. 22. when the plaintiff is nonsuited, *Lindon v. Collins*, M. 17 G. 2. C. B. 429

10. In an action for words, where the words themselves are actionable, if the plaintiff recover less than 40s. damages, he is entitled to no more costs than damages: but where the words themselves are not actionable, the plaintiff is entitled to full costs, though he recover less than 40s. damages. *Turner v. Horton*, M. 17 G. 2. C. B. 438

COURT,

See INFERIOR COURT.

1. A court-baron cannot be holden without two freehold tenants of the manor. *Cbetwode v. Crew*, E. 19 G. 2. C. B. 614
2. Such freehold tenants cannot be created at this day. *ib.*
3. If the lord now convey part of the demesnes of the manor to *A.* and his heirs and other part to *B.* and his heirs, to hold as of his manor by fealty and suit of court, and then hold a court before those two tenants as free tenants, the court is improperly holden, and consequently any amercement at that court is bad. *ib.*
4. An amercement at a court-baron on a free suitor must be affected by two freehold tenants

INDEX TO THE PRINCIPAL MATTERS.

- nants of the manor. [Case referred to in n. 2.] Page 619
5. Where the right to tithes is admitted, and a question arises between the rector and vicar to whom they are payable, that question is triable in the Spiritual Court, and consequently the common law courts will not grant a prohibition. *Cheefman v. Hoby*, M. 31 G. 2. C. B. 680
6. Whether or not the Spiritual Court has jurisdiction over a cause depends, not on the parties being ecclesiastical persons, but on the nature of the question in dispute. *ib.*

COVENANT,

See AWARD, No. 12, 13. CONDITION. TRIAL.

1. If, to covenant for not repairing certain premises demised, the defendant plead that the plaintiff before the cause of action accrued *entered and pulled down the premises and expelled him therefrom*, the plaintiff may reply that *he did not expel &c modo et forma*. *Hodgskin v. Queenborough*, M. 12 G. 2. C. B. 129
2. But he cannot plead an expulsion from part by the plaintiff. *ib.*
3. The lessee covenanted to put a house in repair before the 1st of June. "5000 slates being found allowed and delivered by the lessor towards the repair," and afterwards to keep it in repair during the term; the lessor assigned a breach for not keeping in repair after the 1st of June; defendant pleaded that the lessor had not *after making the lease* found allowed and delivered the slates &c; and plea adjudged to be bad. *Mucklestone v. Thomas*, E. 12 G. 2. C. B. 146
4. But where the lessee covenanted to repair, "the lessor allowing and assigning timber for the repairs," it was holden that the assigning of timber was a condition precedent or a qualification of the covenant to repair; and consequently that in an action against the lessee the lessor must aver that he had assigned timber &c. *Thomas v. Cadwallader*, M. 18 G. 2. C. B. 496
5. Covenant to levy a fine of certain lands in the township of A. (which was in the pa-

rish of B.) on the request and at the costs of the grantee; breach assigned that the grantor refused to acknowledge a fine (tendered to him) of lands in the parish of B.: plea that the note of the fine tendered comprised other lands in B. than those contained in the covenant, of which the grantor was seised; and held a good plea. *Danby v. Gregg*, E. 12 G. 2. C. B. Page 150

6. Where several persons covenant in respect of a joint interest, the covenant is joint notwithstanding the words *cum quolibet eorum*. *Johnson v. Wilson*, Tr. 14 & 15 G. 2. C. B. 254

7. In an action against the heir on a covenant made by the ancestor it is not necessary to allege in the declaration that the heir had lands by descent: if he had none, he must plead it. *Dyke v. Sweeting*, M. 19 G. 2. C. B. 585
8. To an action on a covenant to pay money on a particular day, the defendant cannot plead payment on a prior day; he must plead payment on the day. *ib.*
9. On a covenant to pay money at the end of six months, it will be understood to mean calendar (not lunar) months; *semb.* *ib.* 588

COVENANT to stand seised.

See DEED, No. 4, 5, 6, 7, 8.

CREDITOR,

See DEVISEE.

CUSTOM.

1. A party cannot justify a trespass under a custom for all the inhabitants of a town to walk and ride over a close of arable land at all seasonable times of the year, if it appear that the trespass was committed when the corn was standing, though the party aver that it was a seasonable time. *Bell v. Wardell*, E. 13 G. 2. C. B. 202
 2. Whether a custom, so generally laid, be good? *qu.* *ib.* 206
 3. A custom for all the inhabitants of a town to dance at all times of the year in a close of pasture holden good. [A case cited.] *ib.* 505
4. A

INDEX TO THE PRINCIPAL MATTERS.

4. A custom for all the inhabitants of a town "to play at any rural sports or games in a close at all times of the year" is too general, as extending to any rural sports. *Millechamp v. Johnson*, Hil. 1746, C. B. Page 505. n. b.
5. In such a case "all times of the year" would be understood to mean only "legal and reasonable times of the year." *ib.* 206
6. But a custom for all the inhabitants of a parish "to play at all kinds of lawful games sports and pastimes at all reasonable times of the year" is good. [A case referred to.] *ib.*
7. Though a similar custom "for all persons for the time being in the said parish &c" is bad. *ib.*
8. So a custom for "the poor necessitous and indigent householders of a town to cut and carry away the rotten boughs and branches" in a close is bad, on account of the uncertain description of the persons. [Case referred to.] *ib.* 207. n. a.
9. A custom that "where the customary tenant of a manor has coal mines lying under the freehold lands of other customary tenants within and parcel of the manor, he may sink pits in those lands to get the coals &c, may lay the coals when got and the earth and rubbish &c on the land near to such pits, such lands being customary tenements &c, there to remain and continue, (not saying how long, or for a convenient time,) may lay and continue wood there for the necessary use of the pits, may take away in carts and waggons part (not saying how much) of the coals, and burn and make into cinders the other parts there at his will and pleasure," is a bad custom, as being uncertain and unreasonable. *Broadbent v. Wilks*, T. 16 G. 2. C. B. 360
10. Instances of certain and uncertain customs. *ib.* 362. n. a. b.
11. Instances of reasonable and unreasonable customs. *ib.* n. c.
12. A custom, in a manor that the grantee of a customary estate (which passes either by deed or surrender and admittance) must be admitted during the life of the grantor, is good in law. *Fenn d. Richards v. Marriott*, M. 17 G. 2. C. B. 430
13. A custom that every man inhabiting in the parish of A., who marries by license in another parish, shall pay 5 s. to the rector of A. for and in regard of the said marriage, is bad. *Richards v. Dorey*, H. 20 G. 2. C. B. Page 622
14. But a custom, that every inhabitant of a parish of the age of 16 (of whatever religious sect) shall pay 4 d. yearly as an Easter offering, is good. *Fulter v. Say*, M. 21 G. 2. C. B. 629
15. A custom, that all the householders in the parish of A. shall grind all their corn which shall be used by them ground within the parish, is good. *Drake v. Wiglesworth*, H. 26 G. 2. C. B. 654
16. But a custom, that they shall grind all their corn used or sold, is bad. *ib.*
17. Such an obligation on an occupier of one of such houses is not extinguished by one of our kings having been formerly seised in fee of such house and of the mill at the same time. *ib.* 658.
18. *Quere*, if it would not have been extinguished by the king's having inhabited such house? *ib.*

D

DEBT,

See JUDGMENT, No. 5.

DEED.

1. No partition of land can be made without deed since the stat. 29 Car. 2. *Johnson v. Wilson*, T. 14 & 15 G. 2. C. B. 253
2. A lease and release by tenant for life do not create a forfeiture. *Grills v. Mannell*, M. 16 G. 2. C. B. 383
3. But a feoffment does. *ib.*
4. A. in consideration of an intended marriage with B., by deed gave granted and conveyed certain lands to B. and C. and their assigns, to hold to the use of B. and her assigns for life in bar of dower, and then to the use of the heirs of the body of B. by A., remainder over, and covenanted that the premises should remain and continue to the uses and intents aforesaid: held that this deed operated as a covenant to

INDEX TO THE PRINCIPAL MATTERS.

Stand seised; and that an only child of the marriage was entitled after the deaths of *A.* and *B.* *Doe d. Milburn v. Salkeld*, T. 28 & 29 G. 2. C. B. Page 673

5. *A.* in consideration of natural love and of 100*l.* by lease and release granted released and confirmed certain premises, after his own death, to his brother *B.* in tail, remainder to *C.* the son of another brother of *A.* in fee; and he covenanted and granted that the premises should after his death be held by *B.* and the heirs of his body, or by *C.* and his heirs, according to the true intent of the deed: held that the deed could not operate as a release, but that it was good as a covenant to stand seised. *Roe d. Wilkinson v. Tranmarr*, H. 31 G. 2. C. B. 683

6. Where a deed cannot operate one way, it may operate in another, to answer the intention of the parties. *ib.*

7. The requisites of a deed, operating as a covenant to stand seised to uses. *ib.* 685

8. The words "covenant to stand seised to uses" are not necessary. 676

9. A party may aver that there was another consideration than that expressed in the deed, if it be consistent with the deed. 677, 685

DEER.

1. Deer in an inclosed ground may be distrained for rent. *Davies v. Powell*, H. 11 G. 2. C. B. 46

DEFEAZANCE,

See PLEADING, No. 35, 36.

1. One deed may operate as a defeazance to another without express words of relation to it. *Trevett v. Aggas*, T. 11 & 12 G. 2. C. B. 107

2. Where a bond was conditioned for payment of money on 25th December, and a subsequent deed between the same parties was executed, by which the obligor covenanted that if the obligee should pay on the 25th of December 5*l.* in the pound &c, such payment should be accepted in full discharge and satisfaction of all sums due &c, and might be pleaded and given in evidence &c; it was holden that the defendant might plead (to an action on the bond) a tender

and refusal of the 5*l.* in the pound on the 25th of December. Page 107

3. The plaintiff declared on a promissory note given to him by the defendant, and alleged that before the note was given it was agreed between them that if the defendant should buy of the plaintiff all the malt expended in his dwelling-house for three years the note should be void; averring that the defendant had expended a certain quantity of malt &c, but had not bought it of the plaintiff; held good on demurrer, because the note formed no part of the agreement, or at the most that the agreement must be considered only as a defeazance, and then if the defendant would take advantage of it he should shew performance on his part. *Cornish v. Bolitho*, E. 12 G. 2. C. B. 145

DEMURRER,

See JUDGMENT, No. 4. PLEADING.

DEPARTURE,

See PLEADING, No. 15, 19, 100.

DESCENT.

1. If tenant in tail of lands by purchase under a settlement made by an ancestor ex parte maternâ, with the reversion in fee by descent ex parte paternâ, suffer a common recovery to the use of himself and his heirs, the lands will descend to his heirs ex parte paternâ. *Martin d. Tregonwell v. Strachan*; in error, *Dem. Proc.* E. 17 G. 2. 444

2. It would have been otherwise, if he had taken both estates by descent from his mother. *ib.* 448.

3. If *A.* seised in fee by descent ex parte maternâ, enfeoff *B.*, and then *B.* re-enfeoff *A.* and his heirs, the line of descent is broken, and the heirs ex parte paternâ will take. [Cases referred to in] *ib.* 453. n. b.

4. So if *A.*, seised in fee of copyhold lands of inheritance by descent ex parte maternâ, surrender to *B.* in fee (a mortgagee), who on payment of principal and interest surrenders again to *A.* and his heirs, the descent is broken and the lands will descend to *A.*'s paternal heirs. *ib.*

DETI-

INDEX TO THE PRINCIPAL MATTERS.

DETINUE,

See BAILMENT, No. 1, 2.

1. Trover and detinue cannot be joined in the same action. *Kettle v. Bromfall, M. 12 G. 2. C. B.* Page 118
2. A declaration in detinue should state a request by the plaintiff on the defendant to deliver &c. *ib.*
3. Detinue will lie for goods lost and found as well as for goods delivered. *ib.*

DEVISE,

See MARRIAGE, No. 1, 2, 3, 4.

1. If a man devise to *A.* for life, and if *A.* die without issue then over, the subsequent words enlarge *A.*'s estate and give him an estate-tail. *Brice v. Smith, E. 10 G. 2. C. B.* 3.
2. Or if he devise to *A.* and his heirs, and if *A.* die without issue then over, the subsequent words restrain the former devise to an estate-tail and shew that "heirs" only mean "heirs of the body." *ib.*
3. And it is immaterial whether the devise over be to the right heirs of *A.* or to a stranger. *ib.*
4. If a portion be given out of *personal estate* to be paid at such a time and the party die before, the portion shall be raised for the benefit of his representatives: aliter if it be to be raised out of the real estate; there it shall sink into the inheritance for the benefit of the heir. *Hervey v. Aston, T. 11 & 12 G. 2. Chanc.* 90, 91
5. A devise of a farm called &c to *A.* for life, remainder to her daughter *B.* she paying to each of her two sisters *C.* and *D.* 500 *l.*; if either of them die, the survivor to have the legacy; if *B.* die, the farm to be divided between the survivors; and in case all three die before *A.*, then to the heirs of *A.* for ever; held that *C.* and *D.* were each entitled to a moiety of the farm in fee on the contingencies of their surviving their mother *A.*, and of their sister *B.* dying before she paid their legacies. *Moone d. Fogge v. Heafman, H. 12 G. 2. C. B.*; and *M. 15 G. 2. B. R.* in error, 138
6. So, if the latter part of the devise "in case

all three die before *A.*, then to *A.*'s heirs &c" had not been added. Page 138

7. A devise to *A.*, he paying debts or a sum in gross, carries the fee. *ib.* 140
8. *A.* by will gave an annuity to *B.* for her life to be paid to her out of certain lands by his executor, and then devised those lands to *C.*, and appointed *C.* his executor: held that *C.* took an estate at least during the life of the annuitant. *Jenkins v. Jenkins, M. 26 G. 2. C. B.* 650
9. *Quære*, if he did not take an estate in fee? *Semb.* *ib.*
10. Devise "to my brother *T. Eagle* for life, then to the nearest of my relations, namely, to *B.* the son of *Thomas* and his heirs for ever, and after their deceases to the nearest of kindred to me, first male and then female; the house &c to descend to the name of *Eagle*, to be kept up as long as the world shall endure, and never to be sold;" held that *B.* the son of *T.* took a fee. *Preston d. Eagle v. Funnell, T. 12 & 13 G. 2. C. B.* 164
11. A devise to *A.* and his heirs, and if he die without heirs then to *B.* (his son or brother &c) and his heirs, passes only an estate-tail to *A.* *ib.* 165
And *Ginger d. White v. White, T. 16 G. 2. C. B.* 352
And *Goodright d. Goodridge v. Goodridge, M. 16 G. 2. C. B.* 370
12. But if the devise over be to a stranger, *A.* takes a fee. *ib.*
13. So if the devise over be to a person of the half blood of the first devisee. [Case referred to, *n. a.*] 165
14. A devise to *A.* and his heirs, but if he die before 21 then to *B.* and his heirs, is a good executory devise to *B.*; and if *B.* survive the devisor it will descend to *B.*'s heir, though *B.* die before the contingency happens, *ff.* the death of *A.* before 21. *Goodtitle d. Gurnall v. Wood, T. 13 & 14 G. 2. C. B.* 211
15. Executory devises, when good. *ib.* 213
16. *J. S.* devised lands to *A.* till *B. C.* and *D.* attained their respective ages of 21 and then to *B. C.* and *D.* and their heirs equally to be divided between them as tenants in common, charged with the payment of an annuity

INDEX TO THE PRINCIPAL MATTERS.

- of 10*l.* by B. C. and D. equally and proportionably out of their several estates: then he devised other lands to A. in fee; and then gave all the rest residue and remainder of his real and personal estate not before given to E. her heirs executors &c. and directed that his debts &c. should be paid out of the estate given to A. and E.: it was holden that the devise to B., on his dying before the devisor, was a lapsed devise; and that the heir at law of the devisor, not the residuary devisee, was entitled to B.'s share as not being disposed of by the will. *Doe d. Morris v. Underdown*, M. 15 G. 2. C. B. Page 293
27. The intent of the testator is to be taken as things stood at the time of making his will, and is not to be collected from subsequent accidents. *ib.* 297
28. When a testator gives by his will all his interest in certain lands, so that if he were to die immediately nothing would remain undisposed of, he cannot intend to give any thing in those lands to his residuary devisee. *ib.*
29. The word "estate" in a will carries the fee. *ib.* 296
30. A devise of lands to A. till B. attains the age of 21, and then to B. in fee, gives B. a vested interest, descendible to his heirs if he die before 21. *ib.* 301
31. Devise of freehold lands to the wife for life, and after her death to such child as his wife was enscint of in fee; provided that if such child as should happen to be born as aforesaid should die before 21 without issue the reversion of one third should go to the wife and the reversion of the two other thirds to the devisor's sisters; the wife was not enscint at all; held that the remainder over depended on the birth of a child and it's dying under 21 and without issue; and that as those events never happened the remainder over did not take effect, but that the heirs at law of the devisor were entitled to take. *Roe v. Fulham*, H. 15 G. 2. C. B. 303
32. The word "or" in a will may be construed "and," to effectuate the intention of the devisor. *ib.* 311
23. Under a devise to A. for life, and after his decease to the male children of A. successively and to their heirs, and in default of such male children to the female children of A. and their heirs, and in case A. die without issue then to B. (the elder brother of A.) in fee, A. takes only an estate for life. *Ginger d. White v. White*, T. 16 G. 2. C. B. Page 348
24. The devisor, having devised lands to his wife, added "if my son R. (the eldest) happen to die without heirs, then my son J. shall enjoy my lands;" it was holden that R. took only an estate-tail, and that on his death without issue, and without having levied a fine or suffered a recovery, J. was entitled to recover from the devisee of R. *Goodright d. Goodridge v. Goodridge*, M. 16 G. 2. C. B. 369
25. Under a devise to "A. for life, and then to his male children for their lives, and so to the male children descending from them; on their decease or failure then to B. and the heirs male of his body for the same term of life, and upon the same terms as the devisor intended for A. and his male children; and in case B. and his male children failing, then to C. and his male children, for the same term of his and their life and upon the same terms," it was holden that A. took an estate-tail for life only, and that on his death without male issue B. took an estate for life only. *Goodristle d. Cross v. Woodhull*, M. 19 G. 2. C. B. 592
26. A. having an only child B. (a daughter) devised lands to a child with which his wife was then enscint, if a male; but if a female, then the lands were to be divided between B. and that female; and if they both died without issue, then to C. in fee; the child was afterwards born, and was a male; and it was ruled that he took a fee. *Davies d. Tully v. Hamlin*, E. 19 G. 2. C. B. 612

DEVISEE.

1. A devisee of all the devisor's lands, in trust to sell and pay all the devisor's debts &c. cannot be sued under the stat. 3 & 4 W. & M. c. 14. *Gott v. Atkinson*, H. 18 G. 2. C. B. 521

DILA-

INDEX TO THE PRINCIPAL MATTERS.

DILAPIDATIONS.

1. If a parsonage or vicarage house be destroyed by the default of the incumbent, he is bound to rebuild it. *Sellers v. Lawrence*, T. 16 & 17. G. 2. C. B. Page 420
2. But if it be burned down and the incumbent be not in fault, the Ecclesiastical Court will order a fifth part of the profits of the living to be set apart in order to rebuild it. *ib.*
3. Action for dilapidations may be maintained in the courts of common law. *ib.* 421
4. And may be brought against the executors or administrators of the incumbent. *ib.*

DISSENTERS.

1. A baptist preacher qualified according to the stat. 1 W. & M. c. 18. is exempted from serving all parish offices, whether they existed before or were created since that act, even though he be also engaged in trade. *Kenward v. Knowles*, E. 17 G. 2. C. B. 463

DISTRESS,

See COMMON, No. 10. COSTS, No. 9. ENTRY, No. 3. HERIOT, No. 1. PLEADING, No. 72.

1. Deer in an inclosed ground may be distrained for rent. *Davies v. Powell*, H. 11 G. 2. C. B. 46
2. Corn sown by a tenant at will (who died before harvest) and purchased by another person cannot be distrained by the landlord for rent due to him from a subsequent tenant. *Eaton v. Southby*, H. 12 G. 2. 136
3. Goods taken in execution cannot be distrained for rent. *ib.*
4. Nor cattle distrained damage feasant. *ib.*
5. Implements of trade cannot be distrained for rent if they be in actual use, or if there be any other sufficient distress on the premises at the time. *Simpson v. Hartopp*, M. 18 G. 2. C. B. 512
6. But if they be not in actual use, and if there be no other sufficient distress on the premises, then they may be distrained for rent. *ib.*
7. They are only privileged sub modo. *ib.* 515

8. But things annexed to the freehold, or things delivered to a person exercising a trade to be carried or worked up in the way of his trade, are absolutely free from distress. Page 515
9. So were cocks or sheaves of corn before the stat. 2 W. & M. c. 5. *ib.*
10. Goods brought to a public fair for sale cannot be distrained by the owner of the soil and fair; for every person has of common right a liberty of carrying his goods to a public fair for sale. *Austin v. Whitted*, T. 21 G. 2. C. B. 623
11. A distress and sale given by statute are in the nature of an execution. *Moyse v. Cockfedge*, H. 22 G. 2. C. B. 636
12. Parish officers levying a poor rate under a warrant of distress may retain of the goods sold the necessary expences of the distress and sale. *ib.*
13. Whether goods taken as a distress on a conviction under an act of parliament can be replevied? *Qu. Pearson v. Roberts*, E. 28 G. 2. C. B. 672
14. No; *semb.* [Cases referred to in n. b.] *ib.*

DISTRESS, Warrant of,

See WARRANT.

DROVER,

See BANKRUPT, No. 13.

EASTER OFFERING,

See FEE, No. 5.

EJECTMENT,

See ENTRY.

ENTRY.

1. A. by will gave a leasehold estate to B. his executors &c., subject to a rent-charge to his wife during her widowhood, with power to the widow to enter for non-payment, and to enjoy &c. until the arrears were satisfied; and after the widow's marriage or death he willed that B. should pay the rent-charge to C. his executors &c.; the widow married, on which C. received the rent-charge during his life, and then C. died without disposing of the rent-charge, appointing D. his executor; held that D. had no right of entry for non-payment of the rent-charge.

INDEX TO THE PRINCIPAL MATTERS.

rent-charge. *Hassell v. Gawthwaite*, M. 18 G. 2. C. B. Page 500

2. If D. had had a right of entry, a previous demand of the rent-charge would have been necessary. *Semb.* *ib.*
3. D. the executor is entitled to the rent-charge; *semb.*; and may distrain for it. *ib.*
4. A right of entry for non-payment must be taken strictly. *ib.* 507

ERROR, Writ of.

1. A writ of error is not a *superfedeas* until allowance or notice of it. *Meriton v. Stevens*, M. 15 G. 2. C. B. 271
2. And if the sheriff has levied under a *fi. fa.* after the issuing, but before the allowance, of a writ of error, he must proceed to sell the goods. *ib.* 280

ESCAPE,

See ARREST, No. 2, 3.

ESTOPPEL,

See PLEADING, No. 6.

1. Though a party to a deed be not estopped by a *general* recital, he is estopped by the recital of a *particular fact* in that deed to deny such fact. *Shelley v. Wright*, Tr. 10 & 11 G. 2. C. B. 9
2. Therefore, where it was recited in the condition of a bond that the obligor had received divers sums of money for the obligee which he had not brought to account, but acknowledged that a balance was due to the obligee, it was holden that the obligor was estopped to say that he had not received any money for the use of the obligee. *ib.*
3. If a defendant, who is arrested by a wrong addition to his name, put in bail thus, "A. B. gent. who was arrested by the name of A. B. clerk," he is not thereby estopped to plead in abatement to the original action that he was sued by the wrong addition. *Smithson v. Smith*, E. 17 G. 2. C. B. 461
4. Whether he be estopped to plead this in abatement in an action on the bail-bond? *Qu.* *ib.*

EVIDENCE.

1. In an action for slander the defendant may under the general issue give in evidence the occasion and manner of speaking the words. *Smith v. Richardson*, M. 11 G. 2. C. B. Pa. 20
2. But he cannot give evidence of the truth of the fact, on the general issue, where the words import felony or treason. *ib.*
3. Nor in cases where the words do not import felony or treason. *ib.* 25 n. a.
4. The *nisi prius* record and the *postea* indorsed are evidence to prove that the cause was tried, but are not evidence to prove that a verdict was given. *Fisher v. Kitchingman*, M. 16 G. 2. C. B. 367
5. A copy of the poll taken at a borough election, examined with the original, and signed by the returning officer, is admissible evidence in an action for bribery. *Mead v. Robinson*, M. 17 G. 2. C. B. 424
6. Parol evidence may be given to prove the voting. *Semb.* *ib.*
7. The original precept from the sheriff to the returning officer of a borough, to proceed to an election, is admissible in evidence to prove the allegation in a declaration that such a precept issued &c. *ib.* 426
8. An allegation in a declaration (for a malicious prosecution) that the plaintiff "by a jury of the said county &c. was duly and in a lawful manner acquitted" is proved by the production of the record by which it appeared that "the jury found the plaintiff not guilty" and upon that judgment was entered "that the plaintiff should go thereof acquitted." *Hunter v. French*, H. 18 G. 2. C. B. 517
9. The depositions of witnesses professing the *Gentoo* religion, who were sworn according to the ceremonies of their religion taken under a commission out of Chancery, may be read as evidence here. *Omichund v. Barker*, H. 18 G. 2. Chanc. 538
10. In an action on the case for enticing away the plaintiff's wife the declarations of the wife are not admissible in evidence. *Winfmore v. Greenbank*, M. 19 G. 2. C. B. 578

INDEX TO THE PRINCIPAL MATTERS.

EXECUTION,

See PRACTICE, No. 1, 2, 3.

1. Goods are bound by the delivery of the writ of fieri facias to the sheriff; and therefore he may execute the writ notwithstanding the death of the party afterwards and before the return. *Eaton v. Southby*, H. 12 G. 2. C. B. Page 135
2. If a sheriff levy under a fieri facias after the issuing, but before the allowance, of a writ of error, he must proceed to sell the goods. *Mariton v. Stevens*, M. 15 G. 2. C. B. 280
3. An execution, once regularly begun, must be completed. *ib.*

EXECUTOR,

See ABATEMENT, No. 3, 4. LIMITATIONS, STAT. OF, No. 2, 3. PLEADING, No. 16, 17, 18, 19. PROMISSORY NOTE, No. 5.

1. An executor may recover in his own name money due to the testator in his life-time and received by the defendant afterwards. *Shipman v. Thompson*, T. 11 & 12 G. 2. C. B. 103
2. Instances where the executor may sue in his own name. *ib.* n. 2. 104
3. Where an executor sues in his own name for money due to the testator in his life-time and received by the defendant afterwards, the defendant cannot set off a debt due to him from the testator. *ib.* 106
4. If a bond be given by the husband (on marriage) to trustees, conditioned to leave the intended wife a sum of money, and the wife be made the executrix of the obligor, she may retain the amount of the bond, and plead such retainer to an action brought against her by another bond-creditor of the husband. *Marriott v. Thompson*, M. 13 G. 2. C. B. 186
5. Aliter if the bond be conditioned to pay the trustees the money in trust for the wife: but in such case the wife may pay the trustees out of the assets, or pay out of her own money and retain assets pro tanto, or

confess judgment to the trustees to cover the assets. Page 188

6. The Court refused to order the administrator of a bailiff (to whom an execution had been delivered) to pay over to the plaintiff the money which he had received after the bailiff's death. *Want v. Swayne*, M. 13 G. 2. C. B. 185
7. Nor would the Court grant an attachment against an administrator for not performing a rule of Court entered into by the intestate. *Newton v. Walker*, H. 15 G. 2. C. B. 315
8. But he may make himself liable to costs, by applying to be made party to a rule of Court in which costs are reserved. *Smales's Executors v. Waite*, H. 19 G. 2. C. B. n. a. 316
9. He may also make himself liable to the plaintiff's demand by submitting his testator's disputes to arbitration and binding himself to perform the award. [Cases referred to in] n. a. 317
10. There may be the like judgment as in case of a nonsuit against an executor plaintiff, for not going on to trial, under stat. 14 G. 2. c. 17., but without costs. *Howard v. Ratborne*, H. 15 G. 2. C. B. 316
11. Plaintiff executor does not pay the costs of a nonsuit. [Cases referred to.] *ib.* n. a.
12. But he pays the costs of a nonpross. *ib.*
13. And costs for not going to trial according to notice. *ib.*
14. An executor is liable to be sued for a debt or duty that the testator ought to have paid or performed. *Sollers v. Lawrence*, T. 16 & 17 G. 2. C. B. 421
15. Though he is not for a mere tort of his testator. *ib.*

EXECUTORY DEVISE,

See DEVISE, No. 14, 15.

EXTINGUISHMENT,

See CUSTOM, No. 15, 17, 18.

F

FACTOR,

See BANKRUPT, No. 1, 2, 3, 4, 5, 6.

FAIR,

INDEX TO THE PRINCIPAL MATTERS.

FAIR.

1. Every person has of common right a liberty of carrying his goods to a public fair for sale; and goods so brought there cannot be distrained, damage feasant, by the owner of the soil and fair. *Austin v. Whittred*, T. 21 G. 2. C. B. Page 623
2. But he cannot erect stalls or place stables there for the purpose of exposing his goods thereon for sale, without the consent of the owner of the soil: if he do, the owner may maintain trespass against him. [Cases referred to] *ib. n. 1.* 628

FALSE IMPRISONMENT,

See ACTION on the Case, No. 6.

FEE.

1. No burial fee is due at common law. *Andrews v. Cawthorne*, H. 18 G. 2. C. B. 536
2. But it may be due by custom in any particular parish. *ib.*
3. The burial fees in *Saint George's Bloomsbury* are by stat. 3 G. 2. c. 19. to be fixed by certain commissioners. *ib.*
4. A custom, that every man inhabiting in the parish of *A.*, who marries by license in another parish, shall pay 5 s. to the rector of *A.* for and in regard of the said marriage, is bad. *Richards q. t. v. Dovey*, H. 20 G. 2. C. B. 622
5. But a custom, that every inhabitant of a parish of the age of 16 (of whatever religious sect) shall pay 4 d. yearly as an Easter offering, is good. *Fuller q. t. v. Soy*, M. 21 G. 2. C. B. 629

FERRY,

See PLEADING, No. 83. 86.

FINE,

See COVENANT, No. 5. MESNE PROFITS.

1. A fine levied by a feme covert without her husband will bind her and her heirs if the husband do not enter and avoid it. *Achery v. Vernon*, E. 12 G. 2. C. B. 160
2. A fine levied by an infant will bind him

for ever, if he do not avoid it during his infancy. Page 161

3. There must be an actual entry to avoid a fine. *Tapner d. Peckham v. Merlott*, T. 12 & 13 G. 2. C. B. 182
4. And an entry subsequent to the lease in ejectment will not make it good by retrospect, so as to support an ejectment. [Cases referred to in n. a.] 330
5. But not necessary in the case of a fine at common law. [Case referred to in n. a.] 182
6. A fine by tenant for years is not tantamount to a feoffment. *Parkhurst v. Smith*, lessee of *Dormer*; in error. *Dom. Proc. H. 15 G. 2.* 341
7. Such a fine is void against strangers. *ib.* 343

FISHERY.

1. The right of fishing in the sea is a right common to all the king's subjects. *Ward v. Creswell*, T. 14 & 15 G. 2. C. B. 268
2. And therefore a prescription for such a right, as annexed to certain tenements, is bad. *ib.*

FORMEDON,

See PLEADING, No. 1.

FRAUDS, Statute of.

1. The stat. of frauds, 29 Car. 2. c. 3. s. 14. only provides for judgments affecting land in case of purchasers. *Savil v. Wiltshire*, E. 19 G. 2. C. B. 428. n. a.

GENTOO,

See EVIDENCE, No. 9.

H

HEIR,

See COVENANT, No. 7. DEVISE, No. 4.

HERIOT.

1. A lord may seize as well as distrain for heriot service. *Edwards v. Moseley*, H. 13 G. 2. C. B. 192
2. Heriots

INDEX TO THE PRINCIPAL MATTERS.

2. Heriots are services and part of the tenure, and such new services cannot be created or heriots reserved since the statute of quia emptores terrarum. *Page 194*

3. If a heriot be reserved by deed since that statute, payable by the tenant in fee, it will be considered as rent, and then the landlord cannot seize, but must either distrain or bring an action for non-payment. *ib.*

4. "Heriot" derived from "here" in Saxon "an army" and "geat" which signifies "provision." *ib.*

HIGHWAY,

See WAY.

HOSPITAL,

See QUARE IMPEDIT.

I & J

JEOFAILS,

See AMENDMENT.

INDICTMENT,

See PLEADING, No. 93, 94.

INFANT,

See FINE, No. 2.

INFERIOR COURT.

1. A defendant in trespass, who justifies under process of an inferior court, admits the trespass by pleading that he delivered the warrant to the officers, to whom it was directed, to be executed. *Rowe v. Tuttle, T. 10 & 11 G. 2. C. B.* 15

2. When the party (the plaintiff below) pleads a justification under the process of an inferior court, he must shew that the cause of action arose within the jurisdiction of that court. *Moravia v. Sloper, M. 11 G. 2. C. B.* 34

3. And so must the attorney for the plaintiff below, or a stranger. *ib.*

4. But the officers of the court need not. *ib.*

5. The defendant below is not concluded by the judgment (against him) of an inferior court not of record, but may plead that

the cause of action did not arise within the jurisdiction. [*Herbert v. Cook, E. 22 G. 3. B. R.*] *Page 36, n. a.*

6. Nor by the judgment of an inferior court of record, even though he pleaded below. *ib.* 35. n. a.

7. In a plea of justification under the process of an inferior court it is necessary to state the nature of the jurisdiction of the court. *ib.* 37

8. A capias cannot be sued out of an inferior court without a precedent summons to warrant it. *ib.* 38

9. And if it be pleaded that at one court the plaintiff below levied his plaint, and such proceedings were thereupon had that at the same court a capias issued, it is bad, and it will not be intended that a summons issued first; *ib.* and *Marpole v. Bassett*, and *Murphy v. Fitzgerald.* *ib.* n. a.

10. But if it be pleaded that the capias issued at a subsequent court, it will be intended that a summons issued first. *Tilley v. Foxall, T. 31 & 32 G. 2. C. B.* 688

11. An officer of an inferior court justified under a precept dated to bear date February 26th, issuing out of a court held February 24th; held that the process was void and the justification bad. *Morse v. James, M. 12 G. 2. C. B.* 122

12. An officer of an inferior court cannot justify under process that is void, though he may under process that is only voidable. *ib.* 125

13. Though an officer is justified in acting under erroneous process, it must be in a case where the court, out of which it issued, had jurisdiction. *ib.* 128

14. Whether it be not necessary for the officer of an inferior court, to whom a precept is immediately directed, to shew a precept returned, under which he justifies? *Qu.* *ib.* 127

15. It is necessary. [Cases referred to.] *ib.* n. a.

16. A precept out of an inferior court "to attach or distrain" the goods of the defendant, to compel his appearance, is good. *Johnson v. Warner, H. 18 G. 2. C. B.* 528

INDEX TO THE PRINCIPAL MATTERS.

17. If it be stated in a plea that a precept issued out of an inferior court, it will be understood that it was issued by the Judge of that court. Page 528

INHABITANTS,

See CUSTOM, No. 1, 2, 3, 4, 6, 13, 14, 15, 16, 17.

INSOLVENT,

See PLEADING, No. 60, 61.

INSURANCE.

1. Insurance on a ship (a privateer) at and from Jamaica to any ports &c at sea or shore, cruising for four months, without further account &c &c, free from average, (before 19 Geo. 2. c. 37.); the insured had interest in the ship to the amount insured; during the four months the crew mutinied, brought the ship by force into Jamaica, and having carried away the arms &c deserted her, by which the further cruise was prevented; held that the assured could not recover, as the ship was in safety in her proper port at the end of the four months. *Pole v. Fitzgerald*; in error. *Cam. Seacc.* E. 25 G. 2. 641

JOINDER of Action.

1. Trover and detinue cannot be joined in the same action. *Kettle v. Bromfall*, M. 12 G. 2. C. B. 120
2. Only those causes of action can be joined that admit the same pleas. ib.
3. And the same judgment also. ib. n. a.

JUDGMENT.

1. The Court permitted judgment to be entered up on a warrant of attorney against a defendant in Jamaica, on an affidavit that he was alive five months before. *Rowndell v. Powell*, H. 11 G. 2. C. B. 66
2. The Court will order judgment to be entered up for the plaintiff in trespass, notwithstanding a verdict for the defendant on a plea of justification, if the justification be bad in law. *Broadbent v. Wilks*, T. 16 G. 2. C. B. 364

3. Though a plaintiff or defendant pray a wrong judgment, the Court must give such judgment as the party is entitled to. *Rayner v. Painter*, E. 16 G. 2. C. B. P. 410

4. And therefore if the defendant, in a demurrer to a declaration, pray judgment of the declaration, and that it may be quashed, and the plaintiff join in demurrer, and the declaration be good, the Court will give judgment in chief in favour of the plaintiff. ib.

5. By stat. 15 G. 2. c. 16. for rebuilding Blandford then lately burned down, commissioners were appointed (who were made a court of record) to settle all differences and demands &c between all persons their heirs executors administrators successors or assigns touching the building &c, and authority was given to them to direct any alterations in the foundations of the new building &c, by taking or giving ground from one to another, and ordering satisfaction to be made by one to the other &c; under this act the Court ordered the sum of 1007. to be paid by A. the executor of the late vicar of B. (whose house was burned down in his life-time) to C. the succeeding vicar; held 1st. that the order (the judgment) was conclusive on A. personally, though it did not appear on the record that A. had received assets to that amount; 2dly. that C. might maintain debt against A. for that sum; and 3dly, that A. could not plead to such action a bond debt of the testator still unpaid and no assets ultra. *Sollers v. Lawrence*, T. 16 & 17 G. 2. C. B. 413

6. A judgment signed in term time relates back to the first day of term, and a judgment signed in the vacation relates to the first day of the preceding term. *Fann v. Atkinson*, M. 17 G. 2. C. B. 427
- Savill v. Wilshire*, E. 19 G. 2. C. B. ib.
- ib.* 428. n. a.

7. And therefore the Court will not set aside a judgment signed after the death of the defendant when by such relation it becomes a judgment of the preceding term when the defendant was alive. ib.

8. In this respect there is no difference between an adverse judgment and a judgment signed

INDEX TO THE PRINCIPAL MATTERS.

- signed under a warrant of attorney. *Hall v. Moss*, T. 16 & 17 G. 2. C. B. Page 428. n. a.
9. Form of judgment in replevin. 481, 2
10. If a declaration on a statute conclude contra formam statuti, and the defendant be found guilty, the judgment need not so conclude. *Myddleton v. Wynn Bart*; in error; *Cam. Seacc. H.* 19 G. 2. 599
11. The judgment in an action on the case on statute, brought by the party grieved, may be in misericordia. *ib.* 600

JUDGMENT *as in Case of a Nonsuit.*
See EXECUTOR, No. 10.

JURISDICTION,
See ACTION, No. 3. COGNIZANCE.
COURT.

- JUROR.**
1. The Court set aside the verdict, because one of the jurymen was not returned on the nisi prius panel but answered to the name of a person who was. *Norman v. Beaumont*, M. 18 G. 2. C. B. 484
2. But where one of the jurors, whose christian name was *Harry*, was named *Henry* in the venire, habeas corpora, and the postea, the Court refused to set aside the verdict given by him and 11 other jurymen properly named. *Wray v. Thern*, M. 18 G. 2. C. B. 488
3. The Court will not now receive the affidavit of a juror respecting the misconduct of the jurymen. [Cases referred to n. a.] 487

JUSTICE,
See REPLEVIN, No. 2.

- K**
- KING.**
1. The defendant cannot plead several matters under the stat. 4 & 5 An. c. 16. when the King is plaintiff. *The King v. The Archbishop of York*, H. 18 G. 2. C. B. 533
2. A nisi prius cannot be granted where the King is a party. *ib.* 535

3. The King is not included in statutes mentioning merely plaintiff and defendant. Page 535

L

LANDLORD AND TENANT,
See NOTICE to quit. LEASE.

1. If the estate of a tenant at will be determined either by his death or by the act of the landlord, he or his executors may reap the corn sown by him. *Eaton v. Southby*, H. 12 G. 2. C. B. 136
2. And therefore the corn sown by a tenant at will (who died before harvest) and purchased by another person cannot be distrained by the landlord for rent due to him from a subsequent tenant. *ib.*

LEASE,
See NOTICE TO QUIT.

1. A tenant for life, having power to grant building leases for 61 years reserving the best improved ground rent, granted a lease for that term, which was not expressed to be a building lease but which contained a covenant by the lessee to keep in repair the demised premises (old houses) or such other house as should be built during the term; held that this was not a building lease within the power. *Jones d. Cowper v. Verney*, T. 12 & 13 G. 2. C. B. 169
2. Such a lease being granted by a tenant for life who had a bare naked power without any legal interest is void, and not capable of confirmation by the remainder man accepting rent. *ib.* 176
3. A voidable lease may be made good by acceptance of rent. *ib.*

LEGACY,
See DEVISE. MARRIAGE, No. 1, 2, 3, 4.

LIBERUM TENEMENTUM,
See PLEADING, No. 63, 64, 65.

- LICENSE.**
1. If *A.* license *B.* to enter his house to sell goods, *B.* may take assistants, if necessary, for

INDEX TO THE PRINCIPAL MATTERS.

- for the purpose of selling the goods. *Dinnell v. Grover*, H. 13 G. 2. C. B. Page 195
2. Aliter, where the license to enter is not for profit but pleasure. [note a.] *ib.*

LIMITATIONS, Statutes of,

See PLEADING, No. 16, 17, 19.

1. Where the statute of limitations is pleaded to an action brought by an executor on a promise made to his testator, the six years are computed from the time when the cause of action arose, and not from the time of obtaining the probate of the will. *Hickman v. Walker*, M. 11 G. 2. C. B. 27
2. But where an action commenced in time abates by the death of the testator or intestate, it may be revived by the executor or administrator within a year afterwards. [note a.] 257
3. If defendant plead the statute of limitations to an action brought by an executor on a promise made to the testator, the plaintiff cannot reply a subsequent promise to himself, because that would be a departure in pleading. *Hickman v. Walker*. 27
4. In pleading a writ sued out within 6 years after the cause of action arose, in order to save the statute of limitations, it is necessary to allege that the writ was returned. *Karwar v. James*, T. 14 & 15 G. 2. C. B. 255
5. A *capias*, without an original, is sufficient for this purpose. *ib.* 257
6. Even though the *capias* be returnable on a common return day, and not on a day certain; for such a writ is only voidable not void. *ib.* 258

LORD,

See COMMON COURT, No. 1, 2, 3, 4.
HERIOT. MANOR.

M

MANOR,

See COURT, No. 1, 2, 3, 4. CUSTOM, No. 12.

1. Common of pasture, without land, may be parcel of a manor, though demised and de-

misable by copy of court-roll. *Masgrave v. Cave*, H. 15 G. 2. C. B. Page 323

2. Things merely incorporeal may be granted by copy of court-roll. *ib.* 324

MARKET,

See FAIR.

MARRIAGE,

See EXECUTOR, No. 4, 5.

1. A bequest of money, to be raised out of land, to daughters "when and as soon as they should marry with consent of trustees, and if they should die before marriage with such consent" then the portions should not be raised; two of the daughters married without consent; held that they were not entitled to their portions. *Hervey v. Aston*, Tr. 11 & 12 G. 2. Chanc. 83
2. But if they survived their husbands, and married again with such consent, then they would be entitled. *ib.*
3. Where there is a devise on condition of marrying with consent, and no devise over, it is evidence of the testator's intention that the condition is only in terrorem. *ib.* 95, 96
4. When the residuary legatee is the person to consent to or dissent from the marriage, whether it be not necessary for him to shew some reasonable cause of objection? *Qu.* 98
5. A custom, that every man inhabiting in the parish of A, who marries by license in another parish, shall pay 5s. to the rector of A. for and in regard of the said marriage, is bad. *Richards q. t. v. Dovey*, H. 20 G. 2. C. B. 622

MESNE PROFITS.

1. When a remainder man has made an actual entry to avoid a fine, a Court of Equity will decree the wrongful possessor to account to him for the rents and profits from the time when his title first accrued, even those that accrued before he made the entry. *Dormer v. Fortescue*, n. a. 343
2. But in a Court of Law the party can only recover the profits that accrued after such actual entry. [Case referred to.] *ib.*

MILL,

INDEX TO THE PRINCIPAL MATTERS.

MILL,

See CUSTOM, No. 15, 16, 17, 18.

MISTRIAL,

See TRIAL.

MONTHS,

See COVENANT, No. 9.

N

NAME,

See PLEADING, No. 89.

1. A man cannot have two Christian names.
Evans v. King, E. 18 G. 2. C. B. 554

NEGATIVE,

See VERDICT SPECIAL.

NISI PRIUS,

See EVIDENCE, No. 4.

NOTICE TO QUIT.

1. Demise from A. to B. for 21 years if both should so long live; but if either should die before the end of the term, then the heirs executors &c. of the person dying should give 12 months' notice to quit; held that the lease could only be determined by 12 months' notice given by the representatives of the party dying before the end of the term; and consequently that such notice given by the lessor to the representatives of the lessee (who died during the term) did not determine it. *Legg d. Scott v. Benion, H. 11 G. 2. C. B. 43*
2. Where power is given to a party to determine a lease on giving a notice in writing, he cannot determine it by a parol notice. *ib. 44*

O

OFFICE,

See DISSENTERS.

1. An agreement with the warden of the Fleet (who held only for life under the crown) that for a sum of money he would surrender the office to the King, to the intent that he

should procure from the King a grant of the office to the purchaser, is void by stat. 5 & 6 Ed. 6. c. 16.; though that office has been, and may be, granted to a subject in fee. *Huggins v. Bambridge, H. 14 G. 2. C. B. Page 241*

2. And a bond given to secure the payment of such consideration money cannot be enforced in a court of law. *ib.*
3. It is not sufficient in a plea to an action on such a bond to state generally that the case is within the statute: the defendant must set forth in his plea facts to shew that the case is within the statute. *ib. 247*
4. The exception in the stat. 5 & 6 Ed. 6. c. 16., that the act shall not extend to any office of which any person is seized of any estate of inheritance, means only offices of which subjects are seized of estates of inheritance. *ib. 246*
5. The office of registrar of an archdeaconry is an office within the meaning of that statute. *Loyng v. Paine, T. 18 & 19 G. 2. C. B. 573*
6. A court of equity has interposed in some cases where it has been thought the courts of law could not. [Cases referred to in n. a.] *ib. 577*
7. A bond given by any of the officers mentioned in that statute, for securing all the profits of the office to the person appointing, is void by the statute. *ib.*
8. So is a bond given by such an officer to surrender whenever the person appointing shall choose. *ib. 574*
9. An officer, having a certain salary or profits, may make a deputation of the office reserving a sum not exceeding the certain profits. [Case referred to n.] *ib. 576*
10. So, where the profits are uncertain, he may grant the office to a deputy, reserving any sum out of the profits. *ib.*
11. But where the profits are uncertain, he cannot grant the office &c. to a deputy, reserving a certain sum at all events. *ib.*

ORDER,

See JUDGMENT, No. 5.

INDEX TO THE PRINCIPAL MATTERS.

OYER.

1. A defendant, who prays oyer of a deed, is entitled to a copy of the attestation and of the names of the witnesses, as well as of every other part of the deed. *Longmore v. Rogers, M. 15 G. 2. C. B. Page 288*

P

PAPIST.

1. A papist, who has not taken the oaths &c, (under an incapacity to hold under stat. 11 & 12 W. 3.) may devise lands to a protestant. *Mallom d. Marfb v. Bringloe, E. 11 G. 2. C. B. 75*
2. He may sell to a protestant, by stat. 3 G. 1. c. 18. *ib.*
3. He may devise for payment of his debts to protestants. *ib.*
4. And may charge lands by a bond &c. *Semb. ib.*
5. A protestant may devise lands to be sold for payment of his debts to papists. [Cases cited.] *ib. 82. n. a.*
6. New oaths to be taken by papists by stat. 18 G. 3. c. 60.; and 31 G. 3. c. 32. *ib. 78. n.*

*Parliament
in Meddellon v. Wynn 606.*
PARSON,

See DILAPIDATIONS.

PARTITION,

See AWARD, No. 12. DEED, No. 1.

PARTY *grieved,*

See COSTS, No. 7, 8.

PAYMENT,

See COVENANT, No. 8, 9.

PAYMENT *of money into Court.*

See COSTS, No. 2, 3, 4, 5.

PENALTY,

See BYE-LAW, No. 1. 6, 7.

PLEADING,

See ABATEMENT. ACCOUNT, No. 5. ASSUMPSIT, No. 6. COMMON, No. 3. 10. CUSTOM, No. 9. DEFEAZANCE, No. 3. DETINUE, No. 1, 2. ESTOPPEL. EXECUTOR, No. 4, 5. INFERIOR COURT. JUDGMENT, No. 2, 3, 4, 5, 9, 10, 11. PROFERT. TROVER.

1. A demandant in formedon, who claims under a devise with a condition, may set forth the devise only without the condition. *Brice v. Smith, E. 10 G. 2. C. B. Page 1*

2. The party need not verify a negative. *Harvey v. Stokes, E. 10 G. 2. C. B. 6*

3. If a party conclude, and "this he is ready to certify" instead of "verify," it is no objection. *ib.*

4. Where the defendant pleads a matter of excuse which admits a non-performance (except in the case of an award) the plaintiff need not assign a breach in his replication. *Shelly v. Wright, Tr. 10 & 11 G. 2. C. B. 12*

5. Aliter, where the defendant pleads a performance. *ib.*

6. When a plaintiff replies that the defendant is estopped to plead his plea, he may demand judgment generally. *ib. 13*

7. When several defendants plead a joint plea, if it be bad as to one defendant, it is bad as to all. *Rowe v. Tuttle, T. 10 & 11 G. 2. C. B. 15*

Moravia v. Soper, M. 11 G. 2. C. B. 32
And *Morse v. James, M. 12 G. 2. C. B. ib. 128*

And *Dennett v. Grover, H. 13 G. 2. C. B. 196*

8. A defendant must admit the trespass, in order to justify it. *Rowe v. Tuttle, T. 10 & 11 G. 2. C. B. 15*

9. A defendant in trespass, who justifies under process of an inferior court, admits the trespass by pleading that he delivered the warrant to the officers, to whom it was directed, to be executed. *ib.*

10. A defendant may justify an assault and battery by pleading *molliter manus imposit* &c in order to arrest &c. *ib. 16*

And

INDEX TO THE PRINCIPAL MATTERS.

- And *Titley v. Foxall*, T. 31 & 32 G. 2. C. B. Page 690
11. So he may justify a battery in the defence of his possession of lands or goods, by pleading *molliter manus imposuit*. 16. n. b.
12. Or even without pleading *molliter manus imposuit*, if actual force be used by the plaintiff. *ib. n. b.*
13. If it do not appear on the record that there is a condition to a recognizance, on which an action is brought, the Court will not intend that there is any condition. *Crosse v. Porter*, M. 11 G. 2. C. B. 18
14. But if it appear on the record that there is a condition, the declaration is bad unless the condition be set forth therein. *ib.*
15. To debt on bond, given by defendant on his marriage with condition that he would permit his intended wife to dispose of 50 l. out of his personal estate, defendant pleaded that he had not prevented his wife disposing of that sum; plaintiff in his replication set forth a particular disposition of the money by the wife, and a request on defendant to pay, and a refusal by him; defendant rejoined that he had not any personal estate out of which he could pay the 50 l.; rejoinder held bad, 1st. because it was a departure from the plea; 2dly. because it would have been no defence if pleaded at first. *Coffens v. Coffens*, M. 11 G. 2. C. B. 25
16. Where the statute of limitations is pleaded to an action brought by an executor on a promise made to his testator, the six years are computed from the time when the cause of action arose, and not from the time of obtaining the probate of the will. *Hickman v. Walker*, M. 11 G. 2. C. B. 27
17. But where an action commenced in time abates by the death of the testator or intestate, it may be revived by the executor or administrator within a year. [n. a.] 257
18. In pleading a writ sued out within six years after the cause of action arose, in order to save the statute of limitations, it is necessary to allege that the writ was returned. *Karver v. James*, T. 14 & 15 G. 2. C. B. 255
19. If defendant plead the statute of limitations to an action brought by an executor on a promise made to the testator, the plaintiff cannot reply a subsequent promise to himself, because that would be a departure in pleading. *Hickman v. Walker*, M. 11 G. 2. C. B. Page 27
20. When the party (the plaintiff below) pleads a justification under the process of an inferior court, he must shew that the cause of action arose within the jurisdiction of that court. *Meravia v. Sloper*, M. 11 G. 2. C. B. 34
21. And so must the attorney for the plaintiff below, or a stranger. *ib.*
22. But the officers of the court need not. *ib.*
23. The defendant below is not concluded by the judgment (against him) of an inferior court not of record, but may plead that the cause of action did not arise within the jurisdiction. [*Herbert v. Cook*, E. 22 G. 3. B. R.] *ib.* 36. n. a.
24. Even though he pleaded below. *ib.* 35. n. a.
25. In a plea of justification under the process of an inferior court it is necessary to state the nature of the jurisdiction of the court. *ib.* 37
26. A *capias* cannot be sued out of an inferior court without a precedent summons to warrant it. *ib.* 38
27. And if it be pleaded that at one court the plaintiff below levied his plaint and such proceedings were thereupon had that at the same court a *capias* issued, it is bad, and it will not be intended that a summons issued first. *Ib.*; and *Marpe's v. Basnett*, and *Murphy v. Fitzgerald*. *ib.* n. a.
28. But if it be pleaded that the *capias* issued at a subsequent court, it will be intended that a summons issued first. *Titley v. Foxall*, T. 31 & 32 G. 2. C. B. 688
29. Replication *de injuriâ suâ propriâ absque tali causâ* is bad where the defendant insists on a right. *Cooper v. Monke*, H. 11 G. 2. C. B. 54
- And *Cockerill v. Armstrong*, Tr. 11 & 12 G. 2. C. B. 99
30. And it is immaterial whether the defendant insists on the right in himself, or whether he justifies by command of another claiming that right. 102
31. So

INDEX TO THE PRINCIPAL MATTERS.

31. So it is bad where the replication puts several matters in issue; as where replied to a plea (to trespass for taking cattle) that *A.* was seized in fee of the locus in quo, and that defendant as his servant took the cattle damage feasant. Page 99
And *Bell v. Wardell, E. 13 G. 2. C. B. 204*
32. So a plea de injuriâ suâ propriâ absque tali causâ to a cognizance for rent, is bad. 100 n. a.
33. When (in trespass) the defendant justifies taking the goods as a distress for rent, the plaintiff in his replication must either admit or deny the rent in arrear; replying de injuriâ suâ propriâ is improper. 54
34. Where the defendant justifies (in trespass for taking the plaintiff's goods and converting them &c.) taking them as a distress for rent, the taking and converting are considered as the same thing; and therefore it is not inconsistent in a plea of justification, as to the taking and converting, to say that he took all the goods, as a distress, and afterwards to say that he left part of them in the plaintiff's possession. ib. 55
35. In pleading a tender of a sum of money according to a defeazance, which is in a different instrument from the original deed, it is not necessary either to plead that the party has always been and still is ready to pay, or to bring the money into court. *Trevett v. Aggas, T. 11 & 12 G. 2. C. B. 110*
36. Aliter, if the defeazance be in the same deed. ib.
37. An officer of an inferior court justified under a precept stated to bear date February 26th, issuing out of a court held February 24th; held that the process was void, and the justification bad. *Morse v. James, M. 12 G. 2. C. B. 122*
38. An officer of an inferior court cannot justify under process that is void, though he may under process that is only voidable. ib. 125
39. Though an officer is justified in acting under erroneous process, it must be in a case where the court, out of which it issued, had jurisdiction. ib. 128
40. Defendant justified as an officer of an inferior court for trying causes touching mines and miners within certain limits; the plea was holden bad, because it did not allege that the defendant below was a miner "at the commencement of the suit below" but only "when the execution issued." Page 128
41. A sheriff, who justifies under a writ, (mesne process,) must shew it returned, though his bailiffs need not. ib. 126
42. Whether it be not necessary for the officer of an inferior court, to whom it's precepts are directed, to shew a precept, under which he justifies, returned? *Qu.* ib. 127
43. It is necessary. [Cases referred to.] ib. n. a.
44. A sheriff, or officer, who justifies under a writ of execution need not shew it returned. [Cases referred to.] ib. 126. n. b.
45. If a plea of justification under a precept of an inferior court shew the return, as well as the precept itself, it must conclude prout patet per recordum, even though it were not necessary to state the return. ib. 126.
46. Where an officer of an inferior court justifies under a precept to take the goods of *A. B.* in execution, the precept and return are not merely inducement but of the substance of the justification. ib. 127
47. So is a judgment, in an action of debt on the judgment. ib.
48. But in an action for an escape, the judgment and execution are only inducement; and where a matter of record, that is only inducement, is insisted on in a plea, the plea need not conclude prout patet per recordum. ib.
49. If the plaintiff in an action in an inferior court, or a mere stranger, justify under process, he must set forth the proceedings at length. ib. 128.
50. Whether a person, who acts at the request of the officers and in their aid in executing civil process of an inferior court, be such a stranger? *Qu.* ib. 129
51. A person, who so acts in executing criminal process, is not. *Semb.* ib.
52. A plea of justification under the process of an inferior court holden "at the forest of *D.*," without stating in what particular part of the forest, good. *Semb.* ib.
53. If, to covenant for not repairing certain premises

INDEX TO THE PRINCIPAL MATTERS.

- premises demised, the defendant pleaded that the plaintiff before the cause of action accrued *entered and pulled down the premises* and expelled him therefrom, the plaintiff may reply that *he did not expel &c modo et formâ. Hodgskin v. Queenborough, M. 12 G. 2. C. B. Page 129*
54. But he cannot plead an expulsion from part. *ib.*
55. Plea alleging that *A. having been* lawfully possessed &c. as tenant at will to *B.* is a sufficient averment that *A.* was tenant at will to *B.* *Eaton v. Southby H. 12 G. 2. C. B. 131*
56. Pleading that corn which had been cut was left on the ground until it was fit in a course of husbandry to be carried is sufficient, without saying how long it remained there; the reasonableness of the time being a question of fact for the jury, and not a question of law for the Court. *ib.* 134
57. So when a party justifies under a custom for all the inhabitants of a town to go over a close *at all seasonable times* of the year, seasonable time is partly a question of law and partly of fact. *Bell v. Wardell, E. 13 G. 2. C. B. 206*
58. If *A.* license *B.* to enter his house to sell goods, *B.* may take assistants if necessary for the purpose of selling the goods: and if it be pleaded that *B.* and also *C.* and *D.* his servants and by his command entered for that purpose, and *necessarily continued* there so long, it will be understood that it was necessary for them to enter. *Dennett v. Grover, H. 13 G. 2. C. B. 195*
59. In pleading a judgment of a court of limited jurisdiction it is necessary to state those facts that give that court a jurisdiction; and having stated those, the party may allege generally that that court gave such a judgment. *Ladbroke v. James, H. 13 G. 2. C. B. 197, and Sollers v. Lawrence, T. 16 & 17 G. 2. C. B. 413*
60. The insolvent act, 10 G. 2., gave the court of quarter sessions power to discharge certain persons who had surrendered before a certain time; it was ruled that in pleading a discharge by a court of sessions it was necessary to allege that the party was in prison or had surrendered himself before that time. *Page 199*
61. Saying "that he was duly discharged by the court of quarter sessions from his imprisonment aforesaid" is not sufficient. *ib.*
62. Justification (in trespass) under a custom for all the inhabitants of a town to walk and ride over a close of arable land *at all seasonable times* in the year was holden bad, because it appeared in the plea that the trespass was committed when the corn was standing, though the defendant averred that it was a seasonable time. *Bell v. Wardell, E. 13 G. 2. C. B. 202*
63. To a plea of liberum tenementum the plaintiff may reply that the place in question is the soil and freehold of the plaintiff and not the soil and freehold of the defendant. *Lambert v. Stroother, M. 14 G. 2. C. B. 218*
64. When the plaintiff names the close in his declaration in trespass, whether the defendant can plead liberum tenementum? *Qu. ib. 224*
65. To the plea of liberum tenementum the plaintiff may reply in either of three ways; 1st, he may traverse the defendant's plea, and then it is immaterial whether or not he sets forth his own title; 2dly, he may admit the freehold to be in the defendant and insist on a lease or some other title under him; or 3dly, that before the defendant had any thing in the premises, *A. B.* was seised in fee and made a lease either to the plaintiff or to a person under whom he claims, which is subsisting, without confessing or denying the defendant's plea. *ib.* 225
66. When a defendant wishes to avoid a contract as being made contrary to a statute, he must in his plea set forth facts to shew that the case is within the statute: saying generally that the case is within the statute is insufficient. *Huggins v. Bambridge, H. 14 G. 2. C. B. 247*
67. A prescription for a right to fish in the sea, as annexed to certain tenements, is bad, because
8 U

INDEX TO THE PRINCIPAL MATTERS.

- because it is a right common to all the King's subjects. *Ward v. Creswell*, T. 14 & 15 G. 2. C. B. Page 265
68. A prescriptive right claimed in respect of certain ancient tenements &c, without saying how many, is bad. *Semb.* *ib.* 267
69. If a man have a prescriptive right in respect of one tenement and 10 acres and another in respect of another tenement and 10 acres, he must make two several titles in pleading. *ib.*
70. In a counterplea (to a prayer of view in a real action) it is not sufficient for the demandant to say that the tenant is in actual possession of the lands demanded; he must also add, "and of no other lands in the same vill." *Davis v. Lees*, Tr. 16 G. 2. C. B. 348
71. Where a justification in trespass is bad in point of law, the court will order the judgment to be entered up for the plaintiff, notwithstanding a verdict for the defendant on the plea of justification. *Broadbent v. Wilks*, T. 16 G. 2. C. B. 364
72. The defendant in his avowry in replevin stated that by lease and release he in consideration of an annuity therein mentioned conveyed certain premises containing the place where &c to the plaintiff in fee, subject to a rent-charge payable to the defendant during her life, with power of distress for non-payment of the annuity, and that by virtue of the lease and release and by force of the statute &c the plaintiff became seised in fee &c, and then she justified as a distress for non-payment of the annuity: pleas in bar, 1st, that the plaintiff never was seised &c in fee; 2dly, (admitting that the defendant did by the lease bargain and sell &c to the plaintiff for a year,) that at the time of making the bargain and sale the defendant was only seised &c for her life, the reversion in fee then belonging to another, traversing that the defendant was seised in fee of the reversion: both these pleas were holden bad on demurrer; the first, because it denied what was before admitted, and because it traversed only a consequence of law; the second, because it admitted that the defendant had an estate sufficient to justify the distress. *Grills v. Mannell*, M. 16 G. 2. C. B. Page 378
73. The facts pleaded in one plea can neither assist or invalidate another plea on the same record. *ib.* 380
74. In an action for a penalty for breach of a bye-law, whether it should not be positively stated that the defendant was subject to the bye-law when he did the act complained of? *Qu.* *The Gunmakers' Company v. Fell*, M. 16 G. 2. C. B. 390
75. Whether it be sufficient in such a case to state that the fact was done on a day (after a videlicet) after he was subject to the bye-law, as it appears by other parts of the declaration? *Qu.* *ib.*
76. It is sufficient for the assignee of a bail-bond to state in his declaration that the sheriff assigned the bond to him according to the form of the statute, without adding that "the assignment was under the hand and seal of the sheriff." *Dawes v. Papworth*, E. 16 G. 2. C. B. 408
77. To such a declaration the defendant may plead that the sheriff did not assign &c according to the form of the statute; and the plaintiff may tender an issue on it in those words. *ib.*
78. In an action for a penalty under the bribery act, 2 G. 2. c. 24., it is sufficient to state that the defendant corrupted A. B. (a voter &c) to vote for C. D. by giving him a sum of money as a gift or reward for his the said A. B.'s giving his vote &c.; without saying that he gave A. B. that sum for the purpose of bribing him to give his vote &c. *Mead v. Robinson*, M. 17 G. 2. C. B. 427
79. A declaration in replevin should specify the place where the goods were taken: but the defect is cured by the defendant's pleading; he should demur. *Bullythorpe v. Turner*, E. 17 G. 2. C. B. 475
80. A plea of cepit in alio loco (in replevin) is a plea in bar, (not in abatement,) though it pray judgment of the declaration. *ib.* 477
81. In replevin the defendant pleaded cepit in alio loco, and avowed taking the goods in such other place whither they had been fraudulently conveyed within 30 days &c from

INDEX TO THE PRINCIPAL MATTERS.

- from the demised premises, as a distress for rent: the plaintiff in his plea in bar traversed the avowry, and took no notice of the plea; and on demurrer it was holden ill, the avowry being in the nature of a suggestion to entitle the party to a return of the distress, and not traversable. *Page* 477
82. Form of judgment in replevin. *ib.* 481, 2
83. In an action on the case by the owner of an ancient ferry against a person who erects a new ferry near to his, the plaintiff may declare on his possession. *Blisset v. Hart, M. 18 G. 2. C. B.* 508
84. So, in an action on the case by a commoner against a stranger and wrong-doer. *Greenbow v. Ilfley, H. 20 G. 2. C. B.* 621
85. But in an action against the lord, he must set forth his title. *ib.*
86. In a declaration in such an action by the owner of the ferry he need not set forth that he keeps boats and ferrymen sufficient to carry passengers over. *ib.*
87. In an action for a malicious prosecution, in charging the plaintiff with conspiring with others to defraud the defendant of the interest of an *East India* bond, the declaration stated that the bond bore interest "as therein is (not was) mentioned," and held good. *Jackson v. Sharp, H. 18 G. 2. C. B.* 525
88. The defendants justified, in trespass, under a right of common of pasture: the plaintiff replied an inclosure and approvement of the place where &c by the lord of the manor, averring a sufficiency of common left for the defendant "and all other persons of right having and using common &c;" the defendant traversed the sufficiency in those words; and after verdict for the plaintiff on an issue on that traverse the Court refused to grant a repleader, saying those words meant "all persons having a right to use the common." *Paruham v. Patey, H. 18 G. 2. C. B.* 532
89. When the King is plaintiff in a quare impedit, the defendant cannot plead several matters under the stat. 4 & 5 An. c. 16.
- The King v. The Archbishop of York, H. 18 G. 2. C. B.* *Page* 533
90. Though at common law a defendant could not plead several matters in a quo warranto information, he may by stat. 32 G. 3. c. 58. f. 1. *ib.* 534. n. a.
91. It is a bad plea in abatement, that the defendant's name of baptism is not so and so. *Evans v. King, E. 18 G. 2. C. B.* 558
92. In an action on the case for enticing away the plaintiff's wife, it is not necessary to set forth the means used by the defendant to entice &c. *Winsmore v. Greenbank, M. 19 G. 2. C. B.* 583
93. Nor is it necessary to set forth the means used by the defendants in an indictment for a conspiracy. [Case referred to.] *ib.* n. a.
94. Nor in an indictment under stat. 37 G. 3. c. 70. for endeavouring to seduce soldiers from their allegiance. *ib.*
95. In an action against the heir on a covenant made by the ancestor it is not necessary to allege in the declaration that the heir had lands by descent: if he had none, he must plead it. *Dyke v. Sweeting, M. 19 G. 2. C. B.* 587
96. Nor is it necessary in an action of debt against the heir. *ib.*
97. To an action of covenant to pay money on a particular day the defendant cannot plead payment on a prior day: he must plead payment on the day. *ib.* 586
98. In a plea of tender the defendant must say he was always ready to pay: ready from the time of the tender is not sufficient. *Haldenby v. Tuke, M. 21 G. 2. C. B.* 632
99. To a plea of tender the plaintiff replied a demand and refusal before suing out the writ: rejoinder that before suing out the writ the defendant tendered &c; traversing that at any time after the tender and before suing out the writ the plaintiff requested him to pay &c; rejoinder bad. *ib.*
100. Defendant in a plea justified taking cattle *damage feasant*, and afterwards rejoined that they were taken *surcharging* the

INDEX TO THE PRINCIPAL MATTERS.

the common; held to be a departure.
Ellis v. Rowles, M. 24 G. 2. C. B. Page 638

POLICY,

See INSURANCE.

POOR RATE,

See DISTRESS, No. 12.

POSTEA,

See EVIDENCE, No. 4.

POWER OF ATTORNEY,

See ATTORNEY, No. 1, 2.

PRACTICE,

See COSTS, No. 2, 3, 4, 5. EXECUTION.
JUDGMENT, No. 1.

1. The Court refused to set aside the execution in the second action, (a writ of error having been brought on the first judgment,) because the defendant had not before applied to stay the proceedings in the second action. *Robinson v. Tuckwell*, M. 13 G. 2. C. B. 183
2. And in such case it is immaterial whether the execution has been executed or the writ only delivered to the sheriff to be executed. *Clarkson v. Physick*, M. 13 G. 2. C. B. 184
3. The Court refused to order the administrator of a bailiff (to whom an execution had been delivered) to pay over to the plaintiff the money which he had received after the bailiff's death. *Want v. Swayne*, M. 13 G. 2. C. B. 185
4. Venue charged, after an order for time to plead. *Rowley v. Allen*, H. 15 G. 2. C. B. 318
5. But not where the defendant is under terms to plead issuably and take short notice of trial at the first sittings in London or Middlesex. [Cases referred to in n. b.] *ib.*
6. If a rule be moved for to stay the proceedings in a bail bond, it must not be entitled in the original cause but in the action on

the bail-bond. *Smithson v. Smith*. E. 17 G. 2. C. B. Page 461

7. Bringing an action on a judgment within two terms is not equivalent to charging the defendant in execution within two terms, within the rule, E. 8 G. 1. *Childs v. Prowse*, H. 18 G. 2. C. B. 531

PRECEPT,

See INFERIOR COURT, No. 14, 15, 16, 17.

PRESCRIPTION,

See WAY, No. 1, 2, 5.

PRESENTATION.

1. If A. and B. co-parceners of an advowson do not agree to present on a vacancy, A. the eldest, or her assigns, may present to the first turn, and B. or her assigns to the next. *Barker v. The Bishop of London*, H. 26 G. 2. C. B. 659
2. And if, when A. and B. do not agree, C. (a stranger) implead A. only by quare impedit on a vacancy and recover, it is a bar to a quare impedit brought by B. against C. for that turn, though not for the next turn. *ib.*

PROCESS,

See INFERIOR COURT.

PROCHEIN AMY,

See ATTACHMENT, No. 1.

PROFERT.

1. A party who claims under a deed &c in the hands of a third person, to the possession of which he has no right, need not make a profert of that deed in pleading. *Stone v. Rawlinson*, E. 18 G. 2. C. B. 560
And *Titley v. Foxall*. 689
2. Therefore the indorsee of the administrator of the payee of a promissory note need not make a profert of the letters of administration in his declaration, in an action on the note against the maker. 560

PROHIBITION,

See COURT, No. 5, 6.

PRO-

INDEX TO THE PRINCIPAL MATTERS.

PROMISORY NOTE,

See DEFEAZANCE, No. 3.

1. A promisory note payable to *A.* or order after the death of *B.* is assignable under the stat. 3 & 4 *An. c. 9.*; and consequently the indorsee may maintain an action upon it against the maker. *Coleham v. Cooke*, *H. 16 G. 2. C. B.* Page 393
2. But when the fund out of which payment is to be made is uncertain, or it is uncertain whether or not the time fixed for payment will come, in either of those cases the promisory note is not within the statute. *ib.* 397
3. See instances [n. d.] *ib.* 399
4. Three days' grace are allowed on promisory notes as well as on bills of exchange. [Cases referred to, n. a.] *ib.* 395
5. The executor or administrator of the payee of a promisory note may assign it over to a third person, who may sue on it in his own name. *Stone v. Rawlinson*, *E. 18 G. 2. C. B.* 559

PROTESTANT,

See PAPIST.

Q

QUAKER,

See AFFIRMATION.

QUARE IMPEDIT,

See PRESENTATION.

1. A quare impedit may be brought for a church and an hospital. *The Mayor &c. of Bedford v. The Bishop of Lincoln*, *H. 19 G. 2. C. B.* 608

QUO WARRANTO INFORMATION,

See PLEADING, No. 90.

R

REASONABLE TIME,

See PLEADING, No. 56.

RECOGNIZANCE,

See PLEADING, No. 13.

RECOVERY.

1. If tenant in tail of lands by purchase under a settlement made by an ancestor ex parte maternâ, with the reversion in fee by descent ex parte paternâ, suffer a common recovery to the use of himself and his heirs, the lands will descend to his heirs ex parte paternâ. *Martin d. Tregonwell v. Strachan*; in error. *Dom. Proc. E. 17 G. 2. Page 444*
2. It would have been otherwise, if he had had both estates by descent from his mother. *ib.* 448
3. Origin of common recoveries stated. *ib.* 452
4. The Court will amend a recovery whenever it can be done consistently with the rules of law. *Wynne v. Thomas*, *E. 18 G. 2. C. B.* 563
5. But they cannot amend the teste of a writ of entry, where it is not the misprision of the clerk and where there is nothing to amend by. *ib.*
6. The common vouchee cannot appear by attorney before the day of the return of the writ of summons. *ib.*
7. If the vouchee die before the return of the writ of summons, the recovery is erroneous. *ib.*

REMAINDER.

1. Limitation to *A.* for 99 years, if he so long live, "and from and after the death of *A.* " or other sooner determination of the estate " limited to *A.* for 99 years, then to trustees during the life of *A.* to preserve contingent remainders, and after the end or " other sooner determination of the said " term, then to the first son of the body of " *A.* in tail male," with divers remainders over: *A.*, together with his son *B.*, levied a fine, and suffered a recovery, and both died: held that the limitation to *B.* was a good limitation; that the limitation to the trustees was a vested remainder; that the freehold was in them at the time of levying the fine; consequently that the fine did not make a good tenant to the præcipe, and that

INDEX TO THE PRINCIPAL MATTERS.

that the recovery did not bar either the remainder to *B.* or the subsequent remainders. *Parkhurst v. Smith*, lessee of *Dormer*; in error. *H. 15 G. 2. Dam. Proc. Page 327*

2. Contingent remainders defined. *ib.* 337

RENT-CHARGE,

See CONDITION, No. 1. PLEADING, No. 72.

REPLEVIN,

See COSTS, No. 9. PLEADING, No. 79, 80, 81, 82.

1. A replevin is a personal action, though the title to land be brought in question. *Eaton v. Southby*, *H. 12 G. 2. C. B. 134*
2. An action of replevin to recover damages is an action within the meaning of the stat. 24 G. 2. c. 44., which requires a plaintiff to demand a copy of the warrant of a justice, under which an officer (defendant) acted, before he brings his action. *Pearson v. Roberts*, *E. 28 G. 2. C. B. 668*
3. The court will not grant an attachment against a sheriff for not taking a replevin-bond on his granting the replevin. *Twells v. Colville*, *M. 16 G. 2. C. B. 375*
4. But an action will lie against him for not taking a replevin-bond. *ib.*
5. So, for taking insufficient pledges. [Cases referred to, n. b.] *ib.*
6. In that action the party can only recover to the amount of double the value of the goods distrained. *ib.*
7. If not appearing in a declaration by the assignee of a replevin-bond that the plaintiff was the avowant or person making cognizance, the court of themselves referred to the replevin suit, it being of record in this court, and the declaration concluding prout patet per recordum. *Barker v. Horton*, *E. 17 G. 2. C. B. 460*
8. Goods taken under a distress, for a penalty on a conviction under an act of parliament, cannot be replevied; *semb.* *Pearson v. Roberts*, *E. 28 G. 2. C. B. 672*

RESIGNATION,

See BOND, No. 2.

RETAINER,

See EXECUTOR, No. 4, 5.

RIGHT OF WAY,

See WAY.

S

SET-OFF.

1. Where an executor sues in his own name for money due to the testator in his lifetime but received by the defendant afterwards, the defendant cannot set off a debt due to him from the testator. *Shipman v. Thompson*, *T. 11 & 12 G. 2. C. B. Page 106*
2. But a debt due to the defendant as surviving partner may be set off against a demand on him in his own right. *ib. note.*
3. So a debt due from the plaintiff as surviving partner to the defendant may be set off against a debt due from the defendant to the plaintiff in his own right. *ib. note.*
4. Under the stat. 8 G. 2. c. 24. no debt on bond can be set off, unless it be on a bond for securing the payment of money. *Hutchinson v. Sturges*, *T. 14 & 15 G. 2. C. B. 261*
5. Consequently a bail-bond cannot be set off under that act. *ib.* 263
6. Nor can such a bond (given to an officer of the Palace-court) be set off under the stat. 2 G. 2. c. 22. to an action brought against that officer. *ib.*
7. But a bail-bond assigned over to the party may be set off to an action brought by that party; *semb.* *ib.* 264

SHERIFF,

See ATTACHMENT, No. 4, 5. REPLEVIN, No. 3, 4, 5, 6.

SLANDER,

See COSTS, No. 10. EVIDENCE, No. 1, 2, 3.

1. The court will not arrest the judgment in an action for words in one court, though some

INDEX TO THE PRINCIPAL MATTERS.

some of them be not actionable. *Lloyd v.*

- Morris, E.* 17 G. 2. C. B. Page 443
2. *Aliter*, where there are two counts, and none of the words in one are actionable, and a general verdict for the plaintiff. *ib.*

STATUTES.

1. If the words of the enacting part of a statute be doubtful, they may be explained by the title or preamble. *Coleban v. Cooke*, H. 16 G. 2. C. B. 395
2. But the plain words of an enacting clause are not to be restrained by the title or preamble. *ib.*
3. The stat. 7 & 8 W. 3. c. 7., giving an action for a false return of members of parliament; is a remedial act. *Myddelton v. Wynn, Bart.* in error, H. 19 Geo. 2. Cam. Scac. 599

STATUTES cited or commented upon.

HENRY III.

20. c. 4. Common. 60
52. c. 4. Distress. 530

EDWARD I.

6. c. 1. Glouc. Costs. 442
13. *fl.* 1. c. 1. Estate tail. 450
— *fl.* 1. c. 31. Bill of Exceptions. 535, n. b.
— c. 25. c. 2. Westminster. 62
— c. 48. c. 2. Westminster. 347
18. c. 1. Tenure. 619, n. i.

HENRY VI.

8. c. 12. Amendment. 7. 125. 493
— c. 15. Amendment. *ib.*

HENRY VIII.

7. c. 4. Replevin. 671
21. c. 13. Non-residence. 393, n. a.
23. c. 15. Costs. 441
32. c. 1. Wills. 81
— c. 30. Amendment. 126, n. 485
— c. 32. Rents. 153

EDWARD VI.

- 1 & 3. c. 13. Easter offering. 630
5 & 6. c. 16. Sale of offices. 244. 572
5 & 6. c. 14. Forestalling. 590. 634

ELIZABETH.

5. c. 12. Drovers. Page 590
13. c. 7. Bankrupt. 403. 466, n.
— c. 13. Distress. 636
18. c. 5. Costs. 392. 441
— c. 14. Amendment. 126, n.
27. c. 20. Plymouth. 440
31. c. 5. Limitation. 443, n. a.
43. c. 2. Poor-rate. 636

JAMES I.

1. c. 4. *f.* 6. Papists. 78
— c. 15. Bankrupt. 403, n.
— c. 22. Jurisdiction. 635
3. c. 5. Papists. 79
4. c. 3. Costs. 441
21. c. 4. Jurisdiction. 635
— c. 13. Amendment. 126, n. 434. 486. 492
— c. 16. *f.* 4. Judgment. 257, n.
— c. 15. Costs. 438
— c. 19. Bankrupt. 465. 468

CHARLES I.

16. c. 6. Recovery. 564

CHARLES II.

12. c. 23. Warrant. 413, n. a.
— c. 24. *f.* 25. Warrant. 412
15. c. 8. Cattle. 392
16 & 17. c. 8. Amendment. 7, 8. 126, n. 433. 599. 601
17. c. 17. Replevin. 671
29. c. 3. *f.* 12. Occupant. 504
— c. 3. *f.* 14. Judgment. 428, n.
— c. 3. *f.* 16. Execution. 136
— c. 7. *f.* 6. Sunday. 459

WILLIAM AND MARY.

1. c. 18. *f.* 11. Toleration. 463. 630
2. c. 5. Distress. 515. 636
3 & 4. c. 12. Distress. 636
3 & 4. c. 14. Devisee. 523
5 & 6. c. 12. Capiatur. 600
7 & 8. c. 7. Return to parliament. 597. 602
7 & 8. c. 34. Quaker. 292, n. b.
8 & 9. c. 11. *f.* 4. Trespass. 484, n. a.
11 & 12 W. 3. c. 4. Papists. 77

INDEX TO THE PRINCIPAL MATTERS.

ANNE.

3 & 4. c. 9. Promissory notes.	Page 393. 560
4 & 5. c. 16. Amendment.	7, 8. 13. 126, n.
—————	433
————— f. 4. Double pleading.	533
————— f. 6. Venire.	598
————— f. 20. Bail-bond.	408
————— f. 27. Account.	209
8. c. 14. Landlord. Rent.	376
9. c. 14. Gaming.	425, n. c.
— c. 20. Mandamus.	534
— c. 22. <i>Bloomsbury</i> .	536
10. c. 15. Bankrupt.	469
— c. 21. <i>Bloomsbury</i> .	536

GEORGE I.

1. <i>fl.</i> 1. c. 23. <i>Bloomsbury</i> .	536
3. c. 18. Papists.	82
4. c. 14. <i>Bloomsbury</i> .	536
5. c. 24. Bankrupt.	589
———— 13. Amendment.	126, n.
6. c. 21. Warrant.	413
7. c. 31. Bankrupt.	473

GEORGE II.

2. c. 22. Set-off.	106. 261
— c. 24. Bribery.	422
3. c. 10. <i>Bloomsbury</i> .	536
— c. 25. Juror.	486
4. c. 26. f. 4. Amendment.	60
5. c. 16. Blandford.	414
5. c. 30. Bankrupt.	469. 473. 589
8. c. 24. Set-off.	263
9. c. 23. Warrant.	412
10. ——— Insolvent.	200
— c. 18. <i>Saint Olave's church</i> .	463
11. c. 19. Replevin.	375. 429. 460
12. c. 13. f. 9. Attornies.	288, n. b.
14. c. 17. Judgment.	316
— c. 20. f. 9. Occupant.	504
———— f. 6. Recovery.	568, n. 2.
19. c. 37. Policy.	646
22. c. 46. Quaker.	292, n. b.
23. c. 13. Artificers.	425, n. c.
24. c. 18. Venire.	599, n.
— c. 44. Copy of warrant.	671

GEORGE III.

13. c. 78. f. 34. Highways.	Page 671, n.
16. c. 38. Insolvent.	n. b. 201
18. c. 60. Papists.	78, n.
31. c. 32. f. 1. Papists.	78, n.
— c. 35. Witness.	668, n.
32. c. 58. f. 1. Quo Warranto.	534, n. a.
34. c. 69. Insolvent.	n. b. 201
37. c. 70. Mutiny.	583, n.

STATUTES OF LIMITATIONS,

See PLEADING, No. 16, 17, 18, 19.

SUNDAY.

See ARREST.

SUPERSEDEAS.

See ERROR, WRIT OF.

T

TENANT,

See COURT, No. 1, 2, 3, 4. HERIOT, No. 1, 2, 3. LANDLORD AND TENANT.

TENANT IN COMMON,

See ACCOUNT.

TENDER,

See PLEADING, No. 34, 35, 98, 99.

TENURE,

See COURT, No. 1, 2, 3, 4.

TOLERATION ACT.

See DISSENTERS.

TOLL.

1. A prescription to take toll for passing on an ancient navigable river through the plaintiff's manor is bad in law. *The mayor &c. of Nottingham v. Lambert*, T. 11 & 12 G. 2. C. B. 111
2. A prescription for toll thorough cannot be supported, unless a consideration for it be shewn. *ib.*
3. Aliter of a toll traverse; there a consideration is implied. *ib.*

TRADE,

INDEX TO THE PRINCIPAL MATTERS.

TRADE,

See BYE-LAW, No. 1, 2, 3, 4.

TRESPASS,

See PLEADING.

TRIAL.

1. It is no objection after verdict that an action of covenant for not repairing &c was brought and tried in a foreign county, that defect being cured by the statute 16 & 17 Car. 2. c. 8. *The Bailiffs &c of Litchfield v. Slater. M. 17 G. 2. C. B. Page 431*

TROVER,

See DETINUE.

1. Trover for "old iron," without saying what quantity, good after verdict. *Talbott v. Spear, E. 11 G. 2. C. B. 70*

V

VENIRE FACIAS.

1. The venire facias (in an action on stat. 7 & 8 W. 3. c. 7., which gives an action for a false return of members of parliament) may be de corpore comitatus, that being a remedial act. *Myddelton v. Wynn, Bart. in error, H. 19 G. 2. Cam. Scac. 599*
2. And since, by stat. 24 G. 2. c. 18. s. 3. the venire may be de corpore comitatus in all actions or informations on penal statutes. *ib. n.*

VENUE,

See PRACTICE, No. 4, 5.

VERDICT,

See JUROR.

VERDICT, Special.

1. A negative need not be found in a special verdict, except where it is necessary to shew that a person or thing does not come within a particular exception. *The Mayor &c of Nottingham v. Lambert, M. 12 G. 2. C. B. 117*

VICAR,

See DILAPIDATIONS.

VIEW.

1. A tenant in a real action may pray a view either before or after the demandant has counted. *Davis v. Lees, T. 16 G. 2. C. B. Page 344*
2. A view, being a dilatory, is only to be granted in cases where it is necessary. *ib. 347*
3. And consequently it will not be granted where it appears that the tenant knows what lands are demanded. *ib.*
4. Nor where the tenant is in possession of no other lands in the vill than the demandant sues for. *ib.*
5. And in a counter-plea (to a prayer of view) it is not sufficient for the demandant to say that the tenant is in actual possession of the lands demanded; he must add "and of no other lands in the same vill." *ib. 348*
6. But the tenant is entitled to a view when he is in possession of more lands in the vill than those demanded. *ib. 347*

UNITY,

See CUSTOM, No. 17, 18.

UNIVERSITY,

See COGNIZANCE.

Void & Voidable.
See Lease.

USES,

See DEED, No. 4, 5, 6, 7, 8.

1. A conveyance to uses is to be construed like a common law conveyance. *Tapner d. Peckham v. Merditt, T. 12 & 13 G. 2. C. B. 180*

W

WARRANT,

See REPLEVIN, No. 2.

1. A warrant of distress granted by two justices under stat. 9 G. 2. c. 23. on a conviction for selling spirituous liquors without a license need not be under the seals of the justices: *8 Y*

INDEX TO THE PRINCIPAL MATTERS.

justices: it is sufficient if it be *under their hands*. *Padfield v. Cabell*, Tr. 16 & 17 G. 2. C. B. Page 411

2. A warrant only signifies *an authority*: it does not *ex vi termini* imply an instrument under seal. *ib.* 412

WARRANT OF ATTORNEY,

See JUDGMENT, No. 1.

WAY.

1. A general way and a private way by prescription are inconsistent, and cannot be claimed together. *Chichester v. Lethbridge*, E. 11 G. 2. C. B. 72
2. Prescription for a right of way for *A.* and others (not naming them) is uncertain, and bad even after verdict. *ib.*
3. There may be a way of necessity. *ib.*
4. An action will not lie by an individual for an obstruction in a public highway unless he sustain a particular damage: but if the plaintiff state that the defendant obstructed &c by a ditch and gate across the road, by which the plaintiff was obliged to go a longer and a more difficult way, and that the defendant opposed him in attempting to remove the nuisance, this is a sufficient damage to support the action. *ib.* 73.
5. *A.*, the owner of a close situate within a close belonging to *B.*, had a prescriptive right of way through *B.*'s to his own; 24 years ago *B.* stopped up the old way, and made a new way which was used ever since until lately when *B.* stopped it up; in an action brought by *B.* against *A.* for going over the new way, it was holden that *A.* could not justify using the way as a way of necessity, but that he should either have gone the old way and thrown down the inclosure, or brought an action against *B.* for stopping up the old way. *Reynolds v. Edwards*, M. 15 G. 2. C. B. 282

WILL.

1. The attestation of a will need not state that the witnesses subscribed their names in the presence of the testator. *Brice v. Smith*, E. 10 G. 2. C. B. Page 1

WITNESS.

1. A person who gives a bribe to another to vote at an election for members of parliament is a competent witness to prove the bribery in an action for the penalty under the stat. 2 G. 2. c. 24. *Mead v. Robinson* M. 17 G. 2. C. B. 422
2. On a prosecution for penalties under the stat. 9 An. c. 14. s. 5. the loser of the money at cards is a good witness to prove the loss. [Case referred to in n. c.] *ib.* 425
3. So, on a prosecution for the penalty under 23 G. 2. c. 13. s. 1. for seducing artificers to go out of the kingdom, the prosecutor is a competent witness, though entitled to half the penalty. [n. c.] *ib.*
4. All persons who believe a future state are competent witnesses in this country. *Omi-chund v. Barker*, H. 18 G. 2. C. B. 549
5. A person convicted of petit larceny not then a competent witness; nor a credible witness to attest a will under the statute of frauds. *Pendock v. Mackinder*, H. 28 G. 2. C. B. 665
6. But now by stat. 31 G. 3. c. 35. he is a competent witness. *ib.* 668 n.

WRIT.

1. A *capias* returnable on a common return day, instead of a day certain, is only voidable, not void. *Karver v. James*, T. 14 & 15 G. 2. C. B. 258



London: Printed by A. Strahan,
Law-Printer to the King's Most Excellent Majesty,
Printers-Street.

